STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

JOSEPH G. NICKOLA, Personal Representative
of the Estates of GEORGE NICKOLA, deceased,
And THELMA NICKOLA, deceased,

Docket No. 152535

Plaintiff-Appellant

vs.

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellee.

DEFENDANT-APPELLEE MIC GENERAL INSURANCE CORPORATION'S BRIEF OPPOSING PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Nathan Peplinski P66596
Michael F. Schmidt P25213
Attorneys for Defendant-Appellee
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248)649-7800
npeplinski@harveykruse.com

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The Court of Appeals answered: "no."

The trial court answered: "no."

Plaintiff-appellant answers: "yes."

Defendant-appellee answers: "no."

II. WHETHER THE TRIAL COURT'S DECISION NOT TO IMPOSE ATTORNEY FEE SANCTIONS WAS CLEARLY ERRONEOUS GIVEN THAT PLAINTIFF-APPELLANT FAILED TO PRESENT EVIDENCE THAT SANCTIONS WERE APPROPRIATE, FAILED TO PROVIDE THE INFORMATION ON FEES AND COSTS AS REQUESTED BY THE COURT, AND THEN DELAYED PROCEEDINGS BY YEARS BY FAILING TO MOVE TO START THEIR REQUESTED ARBITRATION?

The Court of Appeals answered: "no."

The trial court answered: "no."

Plaintiff-appellant answers: "yes."

Defendant-appellee answers: "no."

INTRODUCTION

This case involves a claim for underinsured motorist coverage following an auto accident. George and Thelma Nickola[1] settled a claim against the other driver in the accident, Roy Smith, for $40,000, $20,000 each for George and Thelma. The Nickolas sought underinsured motorist coverage following their settlement with Smith from defendant-appellee MIC General Insurance Company. MIC denied underinsured motorist coverage because the Nickolas, who were elderly with significant preexisting conditions before the accident, failed to demonstrate entitlement to further recovery, not only beyond the Michigan no fault threshold, but also beyond the $20,000 they each received from Smith. The Nickolas subsequently filed suit seeking arbitration regarding the underinsured motorist coverage. MIC agreed to arbitration shortly after filing its answer in the suit, but the Nickolas refused to stipulate to dismissal of the suit to go to arbitration. The Nickolas instead dragged the case on for nearly a year before the trial court entered its order to send the case to arbitration. At that time, the trial court also ordered that the Nickolas submit information regarding their fees, costs and expenses to support their motion for sanctions filed against MIC. ***The Nickolas never complied with that order and abandoned the sanction issue***. Each party subsequently named a representative arbitrator. Those arbitrators did not agree on a neutral arbitrator for the matter within 30 days as set forth in the insurance policy. Given that the Nickolas were the parties seeking a recovery and the parties who actually demanded the arbitration, the failure of the arbitrators to agree on a neutral placed the responsibility on the Nickolas to have the trial court appoint a neutral arbitrator as allowed for in the insurance policy arbitration provision. ***But the Nickolas did absolutely nothing***. They instead allowed the case to languish for years. ***In the subsequent six years, both George and***

[1] George and Thelma Nickola will be referred to collectively as the Nickolas and separately by their first names. Plaintiff-appellant Joseph Nickola, who technically is in the role of representing two separate estates, will be referred to as either appellant or Joseph Nickola.

Thelma died without making any effort to prosecute this case. This lack of prosecution of the matter communicated to MIC that the Nickolas had abandoned their position and had agreed with MIC that there was no need for arbitration because they were not entitled to further recovery above the $40,000 they had already received in noneconomic damages. After several more months passed following the deaths, Joseph Nickola sought to substitute into the case for George and Thelma as the representative of their estates. After additional months had passed, Joseph Nickola finally filed a motion to appoint a neutral arbitrator on August 3, 2012, ***six years and five months after the matter was ordered into arbitration.*** Following arbitration, Joseph Nickola then sought to profit from the years of delay by seeking attorney fees and interest to cover the entire time that the Nickolas were doing absolutely nothing in the case. The trial court properly rejected this attempt to profit from the apparent intentional lack of progress and abuse of the arbitration system and denied the motion for sanctions and interest. The Court of Appeals affirmed the trial court's decision regarding MCR 2.114 sanctions and the requested penalty interest pursuant to the Uniform Trade Practices Act (UTPA). The Court of Appeals ruled that the Nickolas' failure to act and neglect of the trial court's mandate to provide the required information regarding their claimed fees and costs was tantamount to waiver of the sanctions issues. The Court of Appeals also explained that appellant was actually seeking to sanction MIC for actions that occurred prior to suit being filed and that MCR 2.114 was not applicable to such claimed misconduct. Regarding the UTPA, the Court of Appeals reasoned that the Nickolas, as underinsured motorist claimants, were, in actuality, third-party tort claimants because they were required to prove a tort case in order to establish entitlement to benefits under the underinsured motorist policy. Given this fact, the Nickolas and appellant were not entitled to automatic UTPA penalty interest, but would have only been entitled to such penalty interest if their claims were

not reasonably in dispute. The lower courts properly concluded that the claims were reasonably in dispute in this case. Appellant has now filed this application attempting to have this Court overturn these well reasoned rulings, which are properly grounded in the language and intent of the relevant statute and court rule. As the Court of Appeals reached a proper and well reasoned conclusion on both issues, there is no need for this Court to grant the application.

APPELLANT FAILS TO ADDRESS MCR 7.302(B) AS REQUIRED

MCR 7.302(B) sets requirements that must be met in order for an appellant to justify his or her appeal to this Court:

> Grounds. The ***application must show*** that
> (1) the issue involves a substantial question as to the validity of a legislative act;
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
> (4) in an appeal before decision by the Court of Appeals,
> (a) delay in final adjudication is likely to cause substantial harm, or
> (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or
> (6) in an appeal from the Attorney Discipline Board, the decision is erroneous and will cause material injustice. [Emphasis added.]

Use of the term "must" in a court rule indicates a mandatory directive. *Grass Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997). Therefore, appellant's failure to comply with this requirement is an appropriate ground to deny the application. But further, appellant cannot meet the necessary standard. This case does not involve a challenge to the validity of a legislative act, which means that subsection 1 is inapplicable. The case is not one of significant public interest or one involving a state institution or officer, so subsection 2 does not

apply. This issues presented are not overarching to the state's jurisprudence in general, and the Court of Appeals presented well reasoned and workable legal interpretations of the relevant statute and court rule. As such, subsection 3 does not support granting the application. Subsection 4 only applies to cases before a decision by the Court of Appeals, so it is inapplicable to the matter at hand. The Court of Appeals properly followed Supreme Court and Court of Appeals precedent in the matter so there is no possible material injustice or clear error of law to warrant granting leave under subsection 5. And subsection 6 deals with appeals in attorney discipline cases, which is totally irrelevant to the case at hand. Under the circumstances, MCR 7.302(B) is not satisfied. This Court should deny the application as a result.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. The Nickolas' Underlying 2004 Accident and Background Information

This case stems from an auto accident occurring on April 13, 2004. The Nickolas alleged injuries caused by another driver, Roy Smith. (Complaint, Appendix 1, ¶¶ 5, 9) The Nickolas had a Personal Automobile Vehicle Insurance policy with MIC. The MIC policy provided both uninsured and underinsured motorist coverage. (Policy Declarations, Appendix 2)

At the time of the accident, the Nickolas were both elderly. George was born June 30, 1928, and Thelma was born January 4, 1928. It is undisputed that, George admitted to prior knee and wrist problems along with diabetes, hypertension and memory problems. Thelma admitted to emphysema, diabetes, high blood pressure and a history of back surgery.

Smith was insured as required by Michigan law. And the Nickolas negotiated with Smith's insurer for a tort settlement following the accident. The Nickolas asked for, and were granted, permission by MIC to settle with Smith ***for his full policy limits*** for liability coverage under his Progressive Insurance insurance policy. MIC sent the letter granting permission to

settle with Smith for the full policy limits on October 14, 2004. (Settlement Permission Letter, Appendix 3) The Nickolas settled with Smith for his full policy limit for tort coverage on November 21, 2004. They each received $20,000 for their tort settlements. (Releases, Appendix 4)

II. The MIC Underinsured Motorist Coverage

The MIC underinsured motorist coverage provides that MIC will pay "compensatory damages which an 'insured' is ***legally entitled to recover*** from the owner or operator of an 'underinsured motor vehicle'. . . ." (Underinsured Motorist Coverage Policy Section, Appendix 5, p 1, emphasis added) Thus, the right to recover benefits under the policy is predicated on the success of a third-party tort claim. (Appendix 5, p 1) The right to recover underinsured motorist benefits is also dependant on the insured obtaining a judgment or settling with the underinsured motorist:

> We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements. [Appendix 5, p 1.]

Pursuant to this provision, the Nickolas were not even eligible to seek underinsured motorist benefits until after the approved settlement with Smith on November 21, 2004. (Appendix 4; Appendix 5, p 1) The Nickolas, in fact, waited over two months before actually making the claim for underinsured motorist benefits on February 8, 2005. (Underinsured Demand Letter, Appendix 6) MIC responded nearly immediately, denying the claim for underinsured motorist coverage on February 17, 2005, noting the Nickolas' preexisting issues and their return to their normal lives following the accident. (Underinsured Denial Letter, Appendix 7)

The MIC underinsured motorist coverage provided for the possibility of arbitration of disputes regarding the entitlement and amount of underinsured motorist coverage:

ARBITRATION

A. If we and an "insured" do not agree:

1. Whether that person is legally entitled to recover damages under this endorsement; or

2. As to the amount of damages;

Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

B. Each party will:

1. Pay the expenses it incurs; and

2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the "insured" is legally entitled to recover damages; and

2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding. [Appendix 5, p 2.]

The Nickolas decided to pursue arbitration, filing a demand for arbitration on February 22, 2005. (Arbitration Demand, Appendix 8) On March 1, 2005, MIC denied the request for arbitration. It mistakenly did so based on standard language that typically appears in MIC uninsured and underinsured policy provisions requiring that both the insured and MIC agree to arbitration. (Arbitration Denial, Appendix 9)

III. The Trial Court Proceedings and Abandonment by the Nickolas

After MIC denied the arbitration request, the Nickolas then waited over a month before filing the complaint underlying this case, demanding arbitration on April 8, 2005. (Appendix 1) MIC retained attorney William Brickley to represent it in the trial court proceedings. Brickley prepared the answer to the complaint. Although he made fair effort, Brickley was not able to

obtain a certified copy of the insurance policy at the time he had to answer the complaint. Brickley prepared the answer to the complaint to the best of his ability without being able to obtain a certified copy of the policy. (Affidavit of Brickley, Appendix 10)

Brickley truthfully answered the complaint to the best of his ability with the information he had available to him. For information he did not have regarding the specific terms in the policy, Brickley answered that the allegations were neither admitted nor denied. This included the information regarding the right to demand arbitration. (MIC Answer, Appendix 11, ¶ 12)

After Brickley answered the complaint with the information he had at the time, MIC was able to locate and provide Brickley with a certified copy of the policy. At that time, Brickley noted that the underinsured motorist coverage section used non-traditional language to allow either party to demand arbitration. He then contacted the Nickolas' attorney to stipulate to the dismissal of the action so that the case could be arbitrated. (Appendix 10)

The Nickolas refused to dismiss the action. They instead demanded that the case proceed until MIC paid the Nickolas some form of claimed attorney fees, albeit without providing a basis for such fees. (Appendix 10) Because the Nickolas would not agree to dismiss the case, which they brought to demand arbitration, and proceed to arbitration as agreed to by MIC, MIC was stuck in the Nickolas' now completely unnecessary litigation.

On February 1, 2006 nearly 10 months into the litigation, the Nickolas filed a Motion to "Correct or Strike Pleadings, Impose Sanctions, Assess Costs and/or Fees and Remove From ADR Docket [sic]." The Nickolas argued that MIC's answer was frivolous because it alleged that permission had to be granted in order to have arbitration and that sanctions should be imposed as a result. (Motion for Sanctions, Appendix 12, ¶ 16) MIC responded noting that the answer to the complaint did not claim that permission was necessary for arbitration and by

providing Brickley's affidavit explaining the inability to obtain the certified policy before the answers. (Response to Motion for Sanctions, Appendix 13, pp 4-5)

The trial court heard oral argument on the motion on February 14, 2006. At the hearing, the Nickolas' attorney explained that he was not seeking a sanction against Brickley for his answer to the complaint. Instead, the Nickolas were seeking sanctions because of the delay caused by MIC in denying arbitration. (2-14-06 Transcript, Appendix 14, pp 13-14) The trial court noted that it had the authority to impose costs against a party, but noted that the Nickolas had failed to submit their actual request for costs to demonstrate that they were affected by the claimed delay ***after the case was filed***. (Appendix 14, pp 16-17) The Court stated:

> THE COURT: Well, I need to look at, at some point in time you agreed to go to arbitration, what happened in the period of time before that and how much time elapsed.
>
> * * *
>
> I'm not going to ask you to come back.
>
> * * *
>
> I just want to see his time frame in terms of his costs and expenses. [Appendix 14, p 17.]

The Nickolas attorney agreed that he would "crystallize those facts and issues" for the Court. (Appendix 14, p 17) The Court then indicated that the rest of the case could go to arbitration while the Court decided the sanction issue so that the arbitration would not be delayed for the Court's ruling on the sanction issue:

> THE COURT: If you want to send it to arbitration - - if you want to do an order sending it to arbitration and leaving this part with me, go ahead and do it. Then you won't hold up on that. [Appendix 14, p 18.]

On March 6, 2006, the Court issued its order splitting the case in two, sending the majority of the case to arbitration, but keeping the sanction issue to be decided by the trial court at that time. The order required the Nickolas to supply their "list of costs and expenses, as well as attorney fees." (3-6-06 Order, Appendix 15)

Following this order, the Nickolas started their pattern of simply ignoring the case. ***The Nickolas never complied with the March 6, 2006 Order. And they never supplied the required list of fees, costs, and expenses***. ***Instead, they simply abandoned the issue***.

The Nickolas waited over two months to name an arbitrator on May 9, 2006. MIC responded three days later, naming its chosen arbitrator and asking that the two arbitrators choose a neutral arbitrator pursuant to the terms of the underinsured motorist arbitration provision. (5-12-06 Letter Regarding Chosen Arbitrators, Appendix 16)

The chosen arbitrators could not decide on a neutral arbitrator within 30 days as required by the policy. Therefore, the policy provided that a motion be filed to seek court appointment of the neutral: "The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction." (Appendix 5, p 2)

As the plaintiffs in the matter, as the parties seeking the arbitration, and as the parties claiming that the $20,000 tort recovery that each of the Nickolas had already received was insufficient to fully compensate them, it was the Nickolas' duty to file the motion to appoint the third/neutral arbitrator. But they did not do so. ***Instead, the Nickolas simply ignored and abandoned the case***. This left MIC in the position of believing that the matter was concluded. It had no reason to press the issue and seek arbitration given that, by failing to seek further arbitration, the Nickolas were apparently conceding MIC's position that the Nickolas were not entitled to further recovery beyond the $40,000 they had already received in noneconomic damages.

IV. The Nickolas Pass Away and Joseph Nickola Restarts the Abandoned Case Years Later

Thelma died of lung cancer on January 24, 2008, a***lmost two years after the case was ordered to arbitration*** on March 6, 2006. (See Second Motion to Assess Costs and Fees,

Appendix 17, p 15, ¶ 33) Even after Thelma's death, nothing occurred in the case or arbitration. Then, ***more than four years later***, George died on April 14, 2012. (Notice of Death, Appendix 18) But still nothing occurred in the case.

Two months after George's death, Joseph Nickola substituted in as the plaintiff in the case on June 13, 2012. (Notice of Substitution, Appendix 19) Even with the substitution of Joseph Nickola as plaintiff, the case did not proceed in a timely manner. Joseph Nickola did nothing in the case for another two months before filing a motion to appoint a neutral arbitrator on August 3, 2012. ***Six years and two months after this should have occurred*** when the two non-neutral arbitrators could not agree on a neutral arbitrator by June 11, 2006. (Motion for Appointment of Arbitrator, Appendix 20; Appendix 16)

On August 13, 2012, the trial court appointed the neutral arbitrator within 10 days of the filing of the motion. (Order Appointing Arbitrator, Appendix 21) Arbitration did not occur for over a year. The hearing finally occurred on October 2, 2013, with the arbitration award entering that same day. (Arbitration Award, Appendix 22)

After the entry of the arbitration award, MIC tendered full payment of the award. ***But this tender was rejected by Joseph Nickola***. Instead, he decided to renew the motion for sanctions abandoned the better part of a decade earlier by the Nickolas. Joseph Nickola requested again that the Court enter an order sanctioning MIC for a frivolous defense pursuant to MCR 2.114. He also requested 12% penalty interest be awarded pursuant to the UTPA. (Appendix 17) Even the filing of this motion was significantly delayed as Joseph Nickola ***waited for nearly two months after the arbitration before finally filing the second motion on November 25, 2013***. (Appendix 17)

Oral argument of the second version of the sanction motion occurred on December 9, 2013. The trial court noted that it did not agree to hold the issue of UTPA penalty interest back from the arbitrators. (12-9-13 Transcript, Appendix 23, pp 15-16) MIC once again tendered full payment of the arbitration awards at the hearing, offering the checks to appellants. (Appendix 23, pp 23-25) Appellant did not accept the tender.

The trial court issued its order on the matter on June 26, 2014. The Court found inconsistency between the no fault act and the UTPA, MCL 500.2006. It also noted that the underinsured motorist claims were reasonably in dispute and that any issue regarding the wrongful withholding of the underinsured motorist benefits should have been submitted to the arbitrators. The Court otherwise denied the motion and affirmed the arbitration. (Final Order, Appendix 24)

V. The Appeal to the Court of Appeals

Appellant filed a claim of appeal to the Court of Appeals on July 7, 2014. (Court of Appeals Docket, Exhibit 30, Entry 1) After twice obtaining extensions for the time to file the appellant brief, appellant finally filed his brief on appeal on February 9, 2015. (Court of Appeals Docket Entries 17-18, 20-21) MIC filed its appellee brief on April 13, 2015. (Court of Appeals Docket, Entry 24) Appellant again delayed, seeking an extension of time to file a reply brief. (Court of Appeals Docket, Entry 26) Appellant finally filed a reply brief on May 22, 2015. (Court of Appeals Docket, Entry 32)

Oral arguments were then scheduled for September 10, 2015. Per its duty to the court, MIC submitted subsequent relevant published authority on the issue of UTPA penalty interest that the Court of Appeals had issued subsequent to MIC's appellee brief on August 28, 2015. (Court of Appeals Docket, Entry 38) MIC cited to *Adam v Bell*, __Mich App__; __NW2d__

(Docket No. 319778, released August 11, 2015) (Appendix 26), in which the Court of Appeals detailed the differences between underinsured/uninsured motorist coverage and first party insurance coverage. That case specifically made clear that the underinsured/uninsured motorist claimants were third-party tort claimants required to prove their third party tort case in order to recover insurance benefits. This ruling directly supported the trial court's conclusion that UTPA penalty interest was not applicable to this case in which the claims were reasonably in dispute. Appellant then moved to strike the subsequent authority, despite it being on point and issued after even appellant's reply brief was filed. (Court of Appeals Docket, Entry 39) MIC responded, noting the frivolity of the motion to strike. (Court of Appeals Docket, Entry 42) The Court of Appeals denied the motion to strike on September 9, 2015. (Court of Appeals Docket, Entry 43)

Oral argument proceeded as scheduled on September 10, 2015. The Court of Appeals then issued its published opinion on September 24, 2015. (*Nickola v MIC Gen Ins Co*, __Mich App__; __NW2d__ (Docket No. 322565, issued September 24, 2015) Appendix 25) Although the trial court's final order affirmed the arbitration award and disposed of all of the actual issues in the case, the Court of Appeals concluded that it did not amount to a "final order" pursuant to MCR 7.202(6) because it was not specifically labeled a "judgment." The Court of Appeals, therefore, characterized the claim of appeal as an application for leave to appeal, which it granted. *Nickola*, __Mich App at slip op p 1 n2.

Regarding appellant's claim for sanctions pursuant to MCR 2.114, the Court of Appeals affirmed the trial court's decision not to award any sanctions. The Court noted the repeated delays and failures of the Nickolas and appellant to supply the fees and costs records requested by the trial court:

> Where plaintiff repeatedly failed to comply with the trial court's order to provide documentation of his attorney fees for the pertinent time period, it is difficult to fault the trial court for failing to award those fees as a sanction under MCR 2.114. Indeed, plaintiff had over eight years to supply the requested fees, but never did so. [*Id*. at slip op p 4.]

The Court concluded that this failure to act for years constituted a waiver. *Id*. The Court also noted that appellant really sought sanctions for the delay caused by the failure to agree to arbitration prior to suit being filed. The Court noted that MCR 2.114 did not apply to such claims. *Id*. at slip op pp 4-5.

Regarding UTPA penalty interest, the Court again affirmed the decision of the trial court not to award penalty interest. Following this Court's precedent in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) and the Court of Appeals precedent in *Adams*, MIC's subsequently submitted authority, the Court of Appeals noted that underinsured motorist claimants like the Nickolas were actually third-party tort claimants:

> In order for plaintiff to succeed on his UIM claim, he has to essentially allege a third-party tort claim against his own insurer—or, in this case, against the insurer of George and Thelma, of whom plaintiff is the personal representative. Defendant, the insurer, stands in the shoes of the alleged tortfeasor and plaintiff seeks benefits from defendant that arose from the alleged tortfeasor's liability. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 464-466; 430 NW2d 636 (1988) (explaining UIM coverage). See also *Rory v Cont'l Ins Co*, 473 Mich. 457, 465; 703 NW2d 23 (2005) (explaining that "[u]ninsured motorist insurance" which is substantially similar to UIM insurance, "permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the [ ] at-fault driver."). This third-party tort claim is different in nature from a typical claim for first-party benefits, as it will "often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life." *Adam v Bell*, Mich App ; NW2d , 2015 Mich. App. LEXIS 1577 (Docket No. 319778, issued August 11, 2015) (citation and quotation omitted), 2015 Mich. App. LEXIS 1577 at *9. In addition, such a third-party tort claim is designed to compensate a claimant "for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses" that are generally associated with a first-party claim. *Id*. (citation and quotation omitted). In other words, plaintiff's UIM claim is tied to a third-party tort claim for damages that, in many respects, is

> "fundamentally different" than a typical first-party claim. See *id*. (citation and quotation omitted). [*Nickola*, __Mich App at slip op pp 6-7.]

The Court concluded that, because the claim for benefits was specifically tied to the underlying third-party tort claim, the reasonably in dispute language of MCL 500.2006(4) applied to the case, which meant that appellant was not automatically entitled to UTPA penalty interest. The Court also affirmed the trial court's conclusion that the insurance claim was reasonably in dispute given the Nickolas' ages, preexisting conditions, the nature of the claimed injuries, and the amount of claimed damages. *Id*. at slip op p 8.

Finally, the Court of Appeals addressed appellant's request for prejudgment interest, which was raised for the first time in the appellant brief on appeal. The Court of Appeals declined to address the issue based primarily on the fact that the trial court's final order did not specifically state that it was a judgment. *Id*. at slip op p 9. The Court remanded to the trial court on this issue explaining that the trial court could deny the claimed interest for the time that the Nickolas and appellant delayed matters. *Id*. at slip op p 10.

No further proceedings occurred in the trail court. Instead, appellant filed his application to this Court on October 29, 2015. (Court of Appeals Docket, Entry 50) Because the application is without merit, MIC files this brief in opposition to the application.

ARGUMENT

I. LEAVE TO APPEAL SHOULD BE DENIED GIVEN THAT THE COURT OF APPEALS CORRECTLY APPLIED THE STATUTE AS WRITTEN TO DETERMINE THAT UNIFORM TRADE PRACTICES ACT PENALTY INTEREST DID NOT APPLY TO THIS UNDERINSURED MOTORIST CLAIM WHERE THE CLAIM WAS REASONABLY IN DISPUTE

A. Standard of Review

A trial court's decision of whether to impose penalty interest is generally reviewed for clear error. *Williams v AAA Michigan*, 250 Mich App 249, 265; 646 NW2d 476 (2002). "The

Court reviews de novo issues of statutory interpretation." *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008), citing *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). "[A] court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indem*, 444 Mich 638, 644; 513 NW2d 799 (1994).

B. Preservation of the Issue

This issue was preserved as it was raised and addressed in the trial court and in the Court of Appeals.

C. The Court of Appeal Properly Concluded that the Reasonably in Dispute Provision of MCL 500.2006(4) Applies to Underinsured Motorist Claims Given that Underinsured Motorist Claimants Must Prove a Third-Party Tort Case to Recover

This matter deals with the meaning of MCL 500.2006(4), which provides when UTPA penalty interest should be imposed:

> (4) ***If benefits are not paid on a timely basis the benefits paid shall bear simple interest*** from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, ***if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance***. ***If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss*** was received by the insurer at the rate of 12% per annum ***if the liability of the insurer for the claim is not reasonably in dispute***, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. . . . [Emphasis added.]

In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998) and in *Griswold Prop LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), lv den 480 Mich 1044 (2008), this Court and the Court of Appeals clarified that MCL 500.2006(4) included two potential classifications of claimants: 1) "the insured or an individual or entity directly entitled to benefits

under the insured's contract of insurance"; and 2) third-party tort claimants. In turn, this Court and the Court of Appeals concluded that the statute's restriction on the applicability of penalty interest to claims that are "reasonably in dispute" only applied to the latter class of claimants. In *Yaldo*, this Court recognized the distinction between cases involving tort claims and those involving only application of a contract:

> Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. ***Where the action is based solely on contract***, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute. [*Yaldo*, 457 Mich at 348 n4, emphasis added.]

Griswold determined that the noted discussion in *Yaldo* was not dictum but was, instead, binding precedent. The Court of Appeals reiterated the ruling from *Yaldo*:

> Thus, we follow the reasoning in *Yaldo* and find that the "reasonably in dispute" language of MCL 500.2006(4) applies only to third-party tort claimants; if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute. [*Griswold*, 276 Mich App at 566, citation omitted.]

This point is not in dispute. In fact, the Court of Appeals carefully and thoroughly discussed *Griswold*. *Nickola*, __Mich App at slip op pp 5-6. The issue in this case is one not addressed by *Griswold* and *Yaldo*. The question here is which of the two classifications of claimants contained in MCL 500.2006(4) is the proper classification for an underinsured motorist claimant. *Id*. at slip op p 6. *Griswold* and *Yaldo* never addressed this issue because they involved simple claims of first party insurance coverage (*Yaldo* was a fire insurance claim and *Griswold* involved three consolidated cases, two of which were first-party water damage claims with the third being a first-party fire insurance claim). *Yaldo*, 457 Mich at 343; *Griswold*, 276 Mich App at 559-560. Addressing this distinct issue, the Court of Appeals in this case properly followed the plain language and intent of the statute and the precedent from this Court in *Yaldo* to find that underinsured motorist claimants

are third-party tort claimants for purposes of MCL 500.2006(4). This conclusion is the only possible conclusion based on the functioning of the underinsured motorist system and the language of the statute.

1. Underinsured Motorist Claimants Are Required to Prove Multiple Things, Including the Right to Recovery in Tort, Before Obtaining Underinsured Motorist Benefits

It is well recognized that the purpose of uninsured and underinsured motorist coverage is to protect against the short fallings of other motorists in obtaining sufficient insurance coverage to adequately compensate for injuries they cause: "Broadly stated . . . the purpose of underinsured motorist coverage is to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile." *Doyle v Metro Prop & Cas Ins Co*, 252 Conn 79, 84; 743 A2d 156 (1999). Essentially, you are purchasing insurance to insure all ***the other drivers*** on the road. Pursuant to this purpose, the underinsured motorist insurer steps into the shoes of the tortfeasor's insurer and ***acts as if it provided insurance to that tortfeasor***. This distinguishes underinsured motorist and uninsured motorist coverage from traditional first-party insurance. While the insured pays for the policy, he or she is actually in the role of a third-party tort claimant that must prove his or her right to recovery as would any other tort claimant. This requirement is contained in the terms of the underinsured motorist coverage, ***which only provides coverage when an insured is legally entitled to recover from a tortfeasor***: "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured' vehicle. . . ." (Appendix 5, p 1)

To meet this requirement, the insured would first have to prove the fault of the other driver: "he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages." *Adam*, __Mich App at slip op p 4. Even if the insured has already filed suit and prevailed against the underlying tortfeasor, this does not automatically

entitle further coverage under the underinsured motorist coverage. The uninsured/uninsured motorist coverage insurer is not bound by the ruling from that case by res judicata. For purposes of res judicata "[a] second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001). The uninsured/underinsured motorist insurer would not be "the same party" as the underlying tortfeasor. Therefore, res judicata would not apply.[2] Thus, in order to be entitled to benefits, the claimant must ***separately*** prove his tort case against the alleged tortfeasor each time an underinsured motorist claim is made. But this duty to prove the tort case is not the only requirement that the claimant must meet to obtain benefits.

He or she would also be required to prove that he or she suffered a serious impairment in excess of the no fault threshold. Tort liability exists in Michigan only if the insured party has a threshold injury:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. [MCL 500.3135.]

This Court has indicated that this requirement must be met in order for uninsured/underinsured motorist coverage to apply:

> We hold that uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135; MSA 24.13135. On the basis of the insurance agreement between the parties at bar, we hold that the insured party is not entitled to damages for

[2] See *Rivera v Esurance Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 274973) 2007 WL 2120527 (Appendix 27), slip op p 4: "That is not the case here. Defendant [underinsured motorist insurer] and the third-party tortfeasor's rights and interests are not the same; therefore, they are not in privity for purpose of the doctrine of res judicata."

> noneconomic loss unless his injuries meet the threshold set forth in § 3135. [*Auto Club Ins Ass'n v Hill*, 431 Mich 449, 451; 430 NW2d 636 (1988).[3]]

In addition to these requirements, the policy requires exhausting the underlying insurance coverage: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted . . . ." (Appendix 5, p 1) ***Thus, the underinsured motorist claimant would be required to take the extra step to show that, not only did the claimant suffer a threshold injury, but also that that injury resulted in damages greater than the coverage already provided by the existing insurance policy***. This would require the submission of significant medical records and entails a potentially subjective evaluation of those medical records' meaning as regard to the claimant's ability to live a normal life and the right to recover noneconomic damages.

Michigan is also a comparative negligence state. MCL 600.2959. Therefore, the underinsured motorist claimant would have to prove a lack of comparative negligence because, by statute, if he or she were more than 50% at fault for the accident, he or she would have no right to recover:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or

[3] See also *Schenck v Asmar*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2014 (Docket No. 315053) 2014 WL 2972048, lv den 497 Mich 954 (2015) (Appendix 28), slip op p 2: "The present case involves an underinsured motorist claim by plaintiff against State Farm. Such a policy allows an individual to collect from their own insurance carrier in the amount that would be permitted in a suit against the at-fault driver. See *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Under the no-fault act, the at-fault driver is liable for noneconomic loss when 'the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.' MCL 500.3135(1). The issue in the present case is whether there was a serious impairment of body function. The no-fault act provides that 'a 'serious impairment of body function' is 'an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.'' *McCormick v Carrier*, 487 Mich 180, 194-195; 795 NW2d 517 (2010). 'Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident.' *Id*. at 202."

> death the damages are based as provided in section 6306 or 6306a, as applicable. I***f that person's percentage of fault is greater than the aggregate fault of the other person or persons***, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and ***noneconomic damages shall not be awarded***. [MCL 600.2959, emphasis added.]

On top of this, pursuant to the terms of the underinsured motorist policy, the insured would additionally have to prove that the accident involved an underinsured motorist vehicle as defined in the policy. In this case, the MIC underinsured motorist coverage provision provides that MIC will pay "compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle'. . . ." (Appendix 5, p 1) The policy then contains a long and detailed definition of underinsured motor vehicle:

> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the limit of liability for this coverage.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment:
>
> 1. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.
> 2. Owned by or furnished or available for the regular use of you or any "family member".
> 3. Owned by any governmental unit or agency.
> 4. Operated on rails or crawler treads.
> 5. Designed mainly for use off public roads while not upon public roads.
> 6. While located for use as a residence or premises.
> 7. Owned or operated by a person qualifying as a self-insurer under any applicable motor vehicle law.
> 8. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
>
> a. Denies coverage; or
>
> b. Is or becomes insolvent. [Appendix 5, p 1.]

"It is without dispute that the insured bears the burden of proving coverage. . . ." *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). Therefore, the underinsured motorist claimant seeking coverage would bear the burden of providing the evidence to show that the accident involved an underinsured motor vehicle as defined by the policy.

Putting this law together in light of the policy terms, in order to claim underinsured motorist benefits, the claimant would have to prove first, that there was an underinsured motor vehicle involved in the accident. Next, the insured would have to show he or she was entitled to recover from the alleged tortfeasor, i.e. there was liability on the part of the tortfeasor. Next, the insured would have to prove that he or she was not comparatively negligent in the accident. Next, the insured would have to prove that his or her resulting damages amounted to a threshold injury and would have to prove the amount of his or her noneconomic damages. On top of this, he would have to prove exhaustion of the underlying policy and entitlement to further noneconomic compensation above what was already obtained from the underlying tortfeasor. Simply, the steps required before underinsured motorist coverage exists makes automatic application of MCL 500.2006(4) penalty interest without the ability to dispute coverage untenable. It was never the intent of the Legislature to impose automatic penalty interest in claims requiring such detailed and complicated proofs prior to the right to receive benefits. This is exactly why the Legislature included the "reasonably in dispute" provision of MCL 500.2006(4).

2. Reversing the Lower Courts Would Require Reversing This Court's Precedent Set in *Yaldo*

Although *Yaldo* did not directly address underinsured motorist coverage, it did provide the basic legal groundwork built on by the Court of Appeals in this case to determine when the "reasonably in dispute" provision applies. This case is controlled by that precedent. Specifically, this Court ruled:

> Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. ***Where the action is based solely on contract***, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute. [*Yaldo*, 457 Mich at 348 n4, emphasis added.]

The key ruling of this Court was that a party is entitled to automatic penalty interest regardless of a reasonable dispute only in cases where their claim was based "***solely***" in contract. *Id*. As outlined in detail above, underinsured motorist claims are not based solely on contract. Instead, these claims are actually based on a tort action against the alleged underlying tortfeasor. In first-party insurance claims like the first-party fire insurance claims at issue in *Griswold* and *Yaldo*, the central question is the applicability of the language of the insurance policy contract. The claimant merely has to quantify his or her damages, i.e. determine what property was lost in the fire, and submit that number to the insurer. The insurer then merely has to assess the submitted damage number in light of policy provisions and its own inventory of the property. This is easily accomplished within the 60 days set by the UTPA. Third-party cases not based solely on contract however, cannot work in the same manner. A party's whose case is dependent on proving a tort case cannot merely submit a number on a proof of loss form to be evaluated by the insurer. Instead, the claimant must prove issues of liability and often esoteric claims such as pain and suffering in order to demonstrate noneconomic damages. These are not items that can be established by a mere inventory but instead often require litigation or at least extensive discovery through examinations under oath and independent medical evaluations. This is exactly why this Court made the distinction it did in *Yaldo* when stating that only in claims "***based solely on contract***" can the insurance company "be penalized with twelve percent interest, even if the claim is reasonably in dispute." *Id*.

Yaldo was correctly decided and controls this case. Contrary to appellant's claim (Application, p 2) the Nickolas did not purchase "first party insurance" because such insurance only involves claims "based solely on contract." *Id*. Instead, as underinsured motorist claimants, they step into the shoes of third-party tort claimants required to prove a third-party tort case, including their noneconomic damages.

This is exactly why the system proposed by appellant is illogical and not functional. Appellant claims that the Nickolas' May 7, 2004 letter referencing underinsured motorist benefits was adequate proof of loss "as a matter of law" and that this "triggered the obligation to pay within 60 days." (Application, p 16) But this argument fails on its face for multiple reasons. First, as of May 7, 2004, the Nickolas had not even settled with Smith. In fact, they did not do so ***for over another six months***, finally settling on November 21, 2004. (Appendix 4) Thus, at the time of this supposed establishment of a right to benefits as a matter of law triggering the duty to pay within 60 days, ***the Nickolas were not even eligible to obtain underinsured motorist benefits as the policy required settlement with the underling tortfeasor and exhausting his insurance coverage***, neither of which had occurred. (Appendix 5, p 1) Put simply, appellant is arguing that MIC had to pay benefits ***four months prior to coverage existing under the policy***. This position is untenable, especially in light of the second problem with this position.

The second major problem with appellant's position is that there is no way to establish what MIC was supposed to pay as of his arbitrarily chosen date, May 7, 2004. Even forgetting that the Nickolas had not settled with Smith or exhausted his policy at that time, there would be no amount established for MIC to pay. Was MIC automatically required to pay the policy limits for both claims because the Nickolas had sent a letter mentioning underinsured motorist benefits? From the Nickolas' actual underinsured motorist coverage demand letter, which demanded $80,000 for both

George and Thelma, this seems to be appellant's position. (Appendix 6) Obviously, this would have been inherently unfair as Thelma ended up recovering less than half of that amount after arbitration. (Appendix 22) The system proposed by appellant is unworkable. Does MIC owe interest on the $33,000 actually recovered, the $80,000 demanded, or some unknown other number never quantified. The simple fact is that underinsured motorist claims are based on noneconomic damages that cannot be known or quantified at the time of the demand. Such inherent uncertainly in tort cases is exactly why this Court limited automatic penalty interest regardless of reasonable disputes to claims "***based solely on contract***". *Yaldo*, 457 Mich at 348 n4, emphasis added.

As the Nickolas claims were not based solely on contract but were instead third-party tort claims, the Court of Appeals properly applied *Yaldo* and affirmed the trial court's decision not to impose UTPA penalty interest. Appellant has not established a basis for this Court to overturn its now well established precedent from *Yaldo*. Therefore, leave should be denied.

3. The Language of MCL 500.2006(4) Supports the Court of Appeals' Ruling

"The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Allison*, 481 Mich at 427. The initial consideration for determining the legislative intent is the language actually chosen by the Legislature: "The starting point in every case involving construction of a statute is the language itself." *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

In this matter, the Court is called on to address the meaning of two classifications of potential claimants provided for in MCL 500.2006(4): 1) "if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance;" and 2) "[i]f the claimant is a third party tort claimant". The key to determining which of the two classifications a claimant falls into is the Legislature's use of the phrase "directly entitled to benefits. . . ." MCL 500.2006(4). By use of this phrase, the Legislature made clear that not

every insured, individual, or entity is automatically entitled to recover penalty interest regardless of whether a claim is properly being disputed. It is only those insureds or individuals or entities directly entitled to benefits that are that are entitled to automatic penalty interest regardless of the reasonableness of the dispute regarding coverage. *Random House Webster's College Dictionary* (2001) defines "directly" as "at once; without delay." ***The Oxford Color College Dictionary Second Edition*** defines "directly" as "immediately". ***There is no way that uninsured and underinsured motorist benefits could meet these definitions or requirements.*** As outlined above, the right to recover such benefits is not immediate, without delay or at once. Unlike a claimant under a first-party fire loss policy or water loss policy where the insured merely has to submit proof of damage to property, the underinsured motorist claimant has to prove: 1) the fault of the other driver; 2) the lack of comparative fault; 3) that the other driver was operating an underinsured motor vehicle as defined in the policy; 4) that a no fault threshold injury exists; 5) that he or she suffered noneconomic damages and 6) the amount of those damages and that amount exceeds the recovery from the underlying tortfeasor. There is no way this multistep process can meet the meaning of "directly." Because an underinsured motorist claimant is not "directly" entitled to benefits, he cannot fall within the first category of potential claimants. Instead, the underinsured motorist claimant is a "tort claimant" as mentioned in the second part of the statute.

Appellant simply ignores the statute's use of the phrase "directly entitled to benefits" and merely argues that, because the Nickolas were "insureds," penalty interest automatically applies. (Application, p 13) This reading of the statute is without merit. "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Apsey v Mem'l Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). Under this rule of law, the "directly entitled to benefits" requirement cannot be ignored. And, as the Nickolas were

not insureds "directly entitled to benefits" the trial court and the Court of Appeals properly applied the reasonably in dispute requirement to their claims.

Appellant may attempt to argue that the last antecedent rule applies so that "directly entitled to benefits" is not read to modify "insured" as used in the MCL 500.2006(4). "This rule of construction provides that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004), citation omitted. The rule should not apply however when its application would create "conceptual difficulties" in the meaning of the statute. *Id*. at 43. The last antecedent rule cannot be applied to this statute because the provision would make no sense. Again, the provision in question is: "If the claimant is the insured or an individual or entity directly entitled to benefits. . . ." The phrase "directly entitled to benefits" cannot be limited to its last antecedent, which is "entity," because the statute would make no sense with this reading. This would mean that any "individual" claimant would be entitled to automatic penalty interest. But a third-party tort claimant would be an "individual." This would mean that the reasonably in dispute language would never apply because each third-party tort claimant would qualify as an "individual" who can escape the reasonably in dispute requirement under the first sentence of MCL 500.2006(4). On the other hand, reading the statute to require that "directly entitled to benefits" modifies each of the three named groups, insured, individuals, and entities, would give full meaning to each of the provisions and would make clear distinctions between the sentences. Parties directly entitled to benefits would fall within the first sentence and parties required to prove a third-party tort case fall within the second group. Again, this Court strives to give meaning to every term and word used in the statute while rendering nothing nugatory in the

statute. *Apsey*, 477 Mich at 127. Because the Court of Appeals ruling gives meaning to all of the terms of the statute where appellant's interpretation would not, his application should be denied.

4. Policy Reasons Exist for the Legislature's Choice in Creating a Distinction Between Those Directly Entitled to Benefits and Tort Claimants Such as the Nickolas

This Court has stated that "policy decisions are properly left for the people's elected representatives in the Legislature, not the judiciary." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005). In this matter, the Legislature has made its policy decision to create a distinction between tort claimants like the Nickolas and claimants directly entitled to benefits like first-party fire insurance claimants. There is no reason to upset this policy choice.

There are wise policy reasons behind the Legislature's decision to distinguish between tort claimants and parties directly entitled to benefits. Primarily, as discussed above regarding this Court's ruling in *Yaldo*, the steps required before underinsured motorist coverage exists makes automatic application of MCL 500.2006(4) to underinsured motorists claimants untenable. The underinsured motorist claimant cannot simply supply medical records or a list of claimed injuries to meet his or her burden to demonstrate entitlement to benefits. Instead, the insured would have to demonstrate proof of liability of the underlying tortfeasor, lack of comparative fault, a threshold injury, the amount of his or her noneconomic damages, exhaustion of the underlying coverage, injuries beyond the recovery in the exhausted underlying coverage, and the involvement of an underinsured motor vehicle as defined in the policy. This is completely different from a first-party insured directly entitled to benefits, such as an insured claiming property damage following a fire. In the latter case, the insured must merely list the cause of the fire and the items damaged to be entitled to recover under the policy. For the first-party property insured, there is no required litigation regarding liability of third parties, damage thresholds that must be met, or most

importantly of all, noneconomic damages. This is the exact opposite as the underinsured motorist tort claimant such as the Nickolas.

Further, if the insurer faces automatic penalty interest simply by an underinsured motorist claimant submitting a letter claiming benefits as occurred in this case, the right to require the claimant to prove liability, noneconomic damages, and the freedom from comparative fault would be read out of the underinsured motorist policy. There is simply no tool by which liability, noneconomic damages, and comparative liability can be judged without detailed investigation into the accident and injuries. This typically requires at least testimony and evidence from the individuals involved and the treating doctors, if not a full forensic investigation. An insurer would never have a sufficient opportunity to investigate so as to defend against a claim within 60 days.

Moreover, appellant's reinterpretation of the statute would shift the burden from the claimant to the insurer. As it stands, the contract requires that the insured prove he or she is entitled to recover in tort: "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured' vehicle. . . ." (Appendix 5, p 1) "It is without dispute that the insured bears the burden of proving coverage. . . ." *Heniser*, 449 Mich at 161 n 6. But if appellant merely has to submit a proof of loss of some kind (or as in this case, a letter demanding benefits and a release for medical records), the burden would then be shifted to the insurer to disprove liability so as to reject the claimant's statement of right to benefits. This was not the system contracted for between the parties. "We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness'" *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23

(2005). It was also not the system contemplated by the Legislature in enacting the UTPA and explained by this Court in *Yaldo*. *Yaldo*, 457 Mich at 348 n4.

Along similar lines, allowing automatic recovery of penalty interest in these cases would eliminate the right to take the case to arbitration. The policy in this case, as in many other underinsured motorist coverage policies, allows for arbitration of disputes regarding the right to underinsured motorist benefits. In this contract, as appellant has pointed out, "[e]ither party may make a written demand for arbitration." (Appendix 5, p 2) But MIC would never have the ability to choose arbitration because, in any case that it chose to arbitrate a matter, it would face automatic penalty interest of 12% during the entire arbitration process.

Just like statutes, this Court strives not to render any portion of an insurance contract nugatory: "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency*, 468 Mich 459, 468; 663 NW2d 447 (2003). Appellant's argument would render multiple parts of the contract nugatory as it would eliminate the right to arbitration and shift the burden of proving liability. This was not what was intended by the Legislature in enacting the statute and should not be supported by this Court.

This Court has already rejected granting leave on this issue. In *Auto-Owners Ins Co v Ferwerda Enterprises Inc (On Remand)*, 287 Mich App 248; 797 NW2d 168 (2010), the Court of Appeals addressed a case in which the insured claimed breach of contract for the insurer failing to provide a defense. The Court of Appeals rejected automatic application of UTPA penalty interest to the matter finding instead that the reasonably in dispute requirement applied to the claim raised by the insured because his claim was tied to his tort case. The Court reasoned:

> Defendants argue that because their award comes from a breach of contract claim, they are entitled to penalty interest. We disagree with defendants'

> characterization. In this case, the breach of contract claim is specifically tied to the underlying third-party tort claim. Indeed, the trial court was exceptionally clear that the amount of the breach of contract claim exactly matched that of the judgment in the underlying tort claim. The trial court only granted a breach of contract claim award to Holiday Inn because plaintiff had not yet paid the judgment in the underlying tort claim.
>
> This is a wholly different situation than that found in the cases where penalty interest was awarded. Griswold involved three consolidated claims, all of which involved an insurance company's failure to pay for the direct losses of the insured, as opposed to the nonpayment of a third-party claim found in this case. *Griswold*, supra at 559-561. This case involves an issue of first impression to Michigan's jurisprudence. The claim, as shown by our prior opinions in these cases, was "reasonably in dispute" and therefore the nonpayment of the claim was not an unfair trade practice. [*Ferwerda*, 287 Mich App at 259-260.]

This Court subsequently vacated the separate portion of the opinion regarding attorney fees, but denied leave on the UTPA penalty interest issue. *Auto-Owners Ins Co v Ferwerda Enterprises*, __Mich __; 784 NW2d 44 (2010). There has been no change in the law and no reason for this Court to change its position on this matter. The Court of Appeals has properly interpreted the statute and enforced the intent of the Legislature in *Ferwerda* and this case. Therefore, leave to appeal should again be denied.

5. This Case is Not the Proper Case to Address UTPA Penalty Interest Given Appellant's Delays and Abuse of the System

What appellant's position in this case really amounts to is an argument that the trial court should have allowed him to convert the UTPA into a profit center whereby a plaintiff can sit on a case for years with, not only no consequence, but a substantial reward at the end of that delay in the form of 12% interest per annum over the years of that delay. The audacity of what appellant requests is fairly staggering. He asks that the Court ignore the more than six years that he and the Nickolas sat on the case doing nothing. He then asks that he be paid with tens of thousands of dollars in interest as a result of this apparently purposeful inactivity. The concept offends basic equity. And there is no basis to allow appellant to create this profit center in the UTPA.

Throughout this matter, appellant has attempted to paint MIC as dilatory because it did not automatically accept the assertion that the injuries to the two elderly Nickolas, who each had significant preexisting conditions, rose above not only the no fault threshold but also the $20,000 recovery that each of them received in tort settlement after the accident. But in reality, all of the real delays in this case were caused by appellant and the Nickolas.

MIC granted the Nickolas permission to settle with Smith on October 14, 2004. (Appendix 3) But the Nickolas did not settle with Smith for his full policy limit for tort coverage until November 21, 2004, ***over a month later***. (Appendix 4) The Nickolas then ***waited over two more months*** before requesting payment for underinsured motorist coverage from MIC on February 8, 2005. (Appendix 6) MIC responded almost immediately, denying the claim for underinsured motorist coverage on February 17, 2005, noting the Nickolas' preexisting issues and their return to their normal lives following the accident. (Appendix 7[4]) The Nickolas then filed a demand for arbitration on February 22, 2005. (Appendix 8) MIC responded almost immediately on March 1, 2005. (Appendix 9[5]) The Nickolas then ***waited over a month*** before filing the complaint on April 8, 2005. (Appendix 1) A short while after answering the complaint, MIC's attorney Brickley obtained the copy of the certified policy and called to ask that the case be dismissed and sent to arbitration as the Nickolas demanded in their complaint. The Nickolas refused, causing further delay. (Appendix 10) The Nickolas did not file their motion for sanctions ***for 10 months***, waiting until February 1, 2006. (Appendix 12) On March

[4] Appellant argues that MIC "never objected" to the Nickola's "satisfactory proof of loss." (Application, p 16) In fact, the Nickola's never submitted a proof of loss. And MIC properly rejected the letter sent asking for benefits and stated the reason for that rejection. (Appendix 7) Therefore, appellant's argument is meritless.

[5] MIC did so mistakenly based on standard language that typically appears in MIC uninsured and underinsured policy provisions requiring both the insured and MIC to agree to arbitration. (Appendix 9)

6, 2006, the trial court then issued its order splitting the case in two, sending it to arbitration, but requiring that the Nickolas supply their "list of costs and expenses, as well as attorney fees," ***which neither the Nickolas nor appellant have ever done***. (Appendix 15) The Nickolas next ***delayed another two months*** before finally naming their designated arbitrator on May 9, 2006. MIC responded almost immediately, naming its chosen arbitrator three days later. (Appendix 16) The arbitrators had 30 days to choose a neutral arbitrator. But if they could not agree by June 11, 2006, ***it was the Nickolas responsibility as the party demanding the arbitration to seek appointment of the neutral***. (Appendix 5, p 2) ***But they did nothing***. Nearly ***two years later***, Thelma died. But still, they did nothing in the case. ***More than four years later***, George died on April 14, 2012. (Appendix 18) Still, they did nothing in the case. ***Another two months passed*** before a substitution for George was filed on June 13, 2012. (Appendix 19) Joseph Nickola, subsequently, did nothing in the case ***for another two months*** before filing a motion to appoint a neutral arbitrator ***on August 3, 2012***. This was ***six years and two months after this should have occurred***. (Appendix 16; Appendix 20) The trial court appointed the neutral arbitrator on August 13, 2012. (Appendix 21) Arbitration did not occur for over a year, with the hearing finally occurring on October 2, 2013. (Appendix 22)

This was at least seven years and six months of delays by the Nickolas and appellant and at least seven years after the hearing could have occurred had the Nickolas agreed to go to arbitration when MIC offered after obtaining and reviewing its certified policy. (Appendix 10) Despite this pattern of causing seven and a half years of delay in the case, appellant now wants this Court to rule that he should be paid for the delay through penalty interest under the UTPA accumulating over the time he was sitting on the case for the better part of a decade. Such claims should be denied on their face as untenable.

The Court of Appeals attempted to excuse part of the delay caused by the Nickolas and appellant by noting that either party could have submitted the motion to have the trial court name the neutral arbitrator. *Nickola,* __Mich App at slip op p 3 n4. While this reading of the insurance policy is technically correct, the ruling is out of touch with the reality of our adversarial system and the fact of this case. In this matter, it was MIC's position that the Nickolas were fully compensated by their $40,000 recovery from Smith, the tortfeasor. It was the Nickolas who initially indicated that they were entitled to additional noneconomic damages. But the Nickolas' inaction in the matter communicated that they had abandoned that position and agreed to MIC's position that they were not entitled to further recovery. Logically, it made no sense for MIC to then demand arbitration on an issue that was apparently no longer in dispute. Certainly, it would be foolhardy for an insurer to demand that an insured make a claim or file suit. And there is nothing in the American adversarial system that would make it do so.

Had this case not been shifted from the trial court's attention by its referral to arbitration, it would have been dismissed years ago. The Nickolas had a duty to prosecute their case, and the failure to do so can result in dismissal by the trial court:

> On motion of a party or on its own initiative, the court may order that an action in which ***no steps or proceedings appear to have been taken within 91 days*** be dismissed for lack of progress unless the parties show that progress is being made or that the lack of progress is not attributable to the party seeking affirmative relief. [MCR 2.502(A)(1), emphasis added.]

The dismissal can be with prejudice if the trial court deems it appropriate. MCR 2.502(B)(1).

Courts have found that dismissal is appropriate when the plaintiff failed to move the case to arbitration but instead allowed it to languish for approximately two years:

> Nevertheless, the trial court does have truly wide discretion in this area. Communicating with the trial court is very important, but Wickings did not communicate with the trial court for almost two years, from the second pretrial hearing in April 1997 until the January 1999 motion. Furthermore, the last fourteen months of the delay before filing the motion to reinstate can be attributed

> to Wickings. Filing the motion was Wickings' responsibility in this case because it was in his interest and it should have been apparent that Dresbach's continuing failure to either draft the arbitration agreement or return opposing counsel's telephone calls made settlement unlikely. There was no apparently good reason to wait more than a year after October 1997, the time at which the parties anticipated settling the case, to file the motion. [*Wickings v Arctic Enterprises Inc*, 244 Mich App 125, 145-46; 624 NW2d 197 (2000), lv den 464 Mich 869 (2001).]

The delay in this case was much more egregious than in *Wickings* as the delay was over three times longer and there was nothing on the part of MIC preventing the arbitration from occurring. The Nickolas case should have been dismissed long ago because, just like in *Wickings*, they were the parties with the interest in moving the case to the final arbitration. There is simply no excuse for the lack of progress in this matter.

But appellant argues that he should not only not be punished for this chosen lack of progress in the case but should profit from it through gaining years of interest at a 12% penalty rate that would not have existed but for the delay. Allowing such a recovery would fly in the face of the integrity of the judicial system. A court has a "fundamental interest in protecting its own integrity and that of the judicial process." *Cummings v Wayne Co*, 210 Mich App 249, 252; 533 NW2d 13 (1995). *Cummings* further articulates that courts have the right to protect judicial integrity and not allow parties to profit from their own abuse of the system:

> While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, see *Clarke v Brunswick Corp*, 48 Mich App 667, 669; 211 NW2d 101 (1973) we do not believe that the distinction prevents a court of law from invoking the "clean hands doctrine" when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The "clean hands doctrine" applies not only for the protection of the parties but also for the protection of the court. *Buchanan Home, supra* at 244. "Tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238, 246; 64 S Ct 997; 88 L Ed 1250 (1944). [*Cummings*, 210 Mich App at 252.]

This Court has subsequently followed the reasoning of *Cummings*: "'The authority to dismiss a lawsuit for litigant misconduct is a creature of the 'clean hands doctrine' and, despite its origins, is applicable to both equitable and legal damages claims. The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 389; 719 NW2d 809 (2006), quoting *Cummings*, 210 Mich App at 252.

There are two possible explanations for the delay in this case: either the Nickolas went to their graves in agreement with MIC's assessment that their injuries did not warrant further compensation above the no fault benefits and the $20,000 recovery that they each received or they and their subsequent representative had the plan all along to delay this case in order to gain 12% interest through the course of the years of delay. Under either scenario, the Nickolas and their subsequent representative do not have clean hands, and cannot fairly claim a right to recover UTPA interest. This Court should protect the judicial integrity in this matter and deny any right to recover under the UTPA.

The purpose of the UTPA penalty interest is to punish ***unreasonable*** delay by an insurer: "The statute referred to by plaintiff is in the nature of a penalty to be assessed against insurers for dilatory practices in settling meritorious claims." *Fletcher v Aetna Cas & Surety Co*, 80 Mich App 439, 445; 264 NW2d 19 (1978), lv den 403 Mich 857 (1978). ***It is not intended to create an alternative source of recovery and profit for the plaintiff***: "The 12 percent interest provision is intended to penalize the recalcitrant insurer rather than compensate the claimant." *Sharpe v Detroit Auto Inter-Ins Exch*, 126 Mich App 144, 148-49; 337 NW2d 12 (1983), citation omitted. Appellant has not cited a single case allowing for the recovery of penalty interest in a case like this where the plaintiff greatly inflated that interest through years of delay. This Court

should not mandate that this case become the first such case, thus opening the flood gates of plaintiffs attempting to engineer substantial delays in order to gain unnecessary interest. The trial court's decision not to impose penalty interest under this unique set of fact does not amount to clear error as required to reverse the decision. *Williams*, 250 Mich App at 265. At the very least, the years of delay make this case a poor vehicle in which to explore the UTPA.

D. The Lower Courts Properly Determined that the Claims Were Reasonably in Dispute

Although appellant glosses over the point, it cannot be forgotten that the Nickolas had already recovered noneconomic damages from Smith. Thus, the Nickolas' claim for underinsured motorist benefits was a claim that they were entitled to more than $40,000 in underinsured motorist benefits due to their traffic accident. MIC took issue with the sufficiency of the submission made by the Nickolas that they were entitled to recover further noneconomic damages. MIC directly indicated that the submitted evidence showed that the Nickolas were adequately compensated, given their preexisting conditions, by the settlement with the underlying tortfeasor for the Progressive policy limits. (Appendix 7) Thus, there was a fundamental and reasonable dispute regarding the extent of the injuries.

Appellant is simply wrong that there was no evidence to support a reasonably in dispute finding. (Applications, p 19) Courts have noted that a claim is reasonably in dispute when the insured and the insurer contest the amount of loss. *OJ Enterprises Inc v Ins Co of North America*, 96 Mich App 271, 274; 292 NW2d 207 (1980), lv den 410 Mich 878 (1981). This is especially true when the insurance policy provides for the determination of the dispute by alternative dispute resolution. *Id*. Moreover, MCL 500.2006(4) is directed at penalizing an insurer that acts with bad faith. Court have noted that, when a good faith dispute exists regarding coverage under the policy, the claim is reasonably in dispute: "We believe that the trial court erred in denying Home Owners'

motion for summary disposition as to the UTPA claim, because it is evident that Home Owners disputed its obligation to cover losses caused by mold in good faith. . . ." *Dahlke v Home Onwers Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2003 (Docket No. 239128) 2003 WL 23018291 slip op p 5 (Appendix 29). See also *Detroit Med Ctr v Titan Ins Co*, 284 Mich App 490, 495; 775 NW2d 151 (2009), finding a claim was reasonably in dispute where there was a "justifiable contrary argument" to coverage.

In this case, the Nickolas were both elderly. George was born June 30, 1928 and Thelma was born January 4, 1928. Thus, they were both approaching 80 at the time of the accident. It is undisputed that George admitted to prior knee and wrist problems along with diabetes, hypertension and memory problems preexisting the accident. Thelma admitted to emphysema, diabetes, high blood pressure and a history of back surgery before the accident. Under the circumstances, it was reasonable for MIC to question the extent of the damages. This is especially true when both Thelma and George received substantial recoveries to cover their injuries, which amounted primarily to broken bones and bruises. Given their existing age and health, it is highly questionable whether these injuries affected the Nickolas' daily life beyond the recoveries they already received. Moreover, MIC did not have definitive proof of complete negligence on Smith's part at the time of the claim. It was the Nickolas' duty to prove this before they could recover from MIC. Under the circumstances, the claim was reasonably in dispute, and the trial court did not err in denying UTPA penalty interest.

Appellant attempts to avoid this point by conflating MIC's mistake regarding the right to unilaterally demand arbitration with the determination of whether the claim was reasonably in dispute. (Application, p 19) One has nothing to do with the other. In fact, the arbitration shows that the claims were reasonably in dispute. Most importantly for this issue, despite demanding the

full policy limits for both George and Thelma (Appendix 6), Thelma's recovery was only $33,000. (Appendix 22[6]) ***Thus, it cannot be denied that the amount of the claim was reasonably in dispute***.

Appellant again attempts to argue that, if this case was reasonably in dispute, every case would be reasonably in dispute because an insurer could always question damages. (Application, p 21) The Court of Appeals properly answered this bit of hyperbole:

> This is not to say that UIM benefits will in all cases be subject to reasonable dispute. For instance, in a scenario where an accident renders an otherwise healthy insured a quadriplegic and the tortfeasor's insurance policy provided only $20,000 in recovery, there could likely be no dispute that the insured was entitled to UIM coverage. [*Nickola*, __Mich App at slip op p 8 n8.]

In reality, the opposite of appellant's argument is true. If claims made by elderly individuals with numerous preexisting conditions suffering rather minor injuries and recovering $20,000 each in noneconomic damages were not reasonably in dispute, no claim really would be. There was no error in the trial court and the Court of Appeals decisions on this issue. And leave to appeal should be denied.

Appellant also argues that the Court of Appeals must be in error because it did not award UTPA interest for the time after the entry of the arbitration award. (Application, p 22) Appellant then accuses MIC of "gamesmanship" because it has pointed out that MIC has tendered the arbitration award to appellant multiple times but has been rejected every time. (Application, p 22 n 2) Appellant's position is inexplicable and any gamesmanship would only be on the part of Appellant. Appellant cannot deny that MIC has tendered payment in full on the arbitration award as it even did so on the record in the trial court. (Appendix 23, pp 23-25) This is not to mention tenders made before and after this point. ***Thus, the only reason that appellant does not have the funds is that he has not accepted them in hopes of obtaining a windfall recovery under the***

[6] The arbitration awards were like inflated by the fact that the Nickolas suffered additional age related problems and died prior to the arbitration limiting the chance for MIC to fully investigate and independently evaluate their conditions once it learned that arbitration would again occur.

UTPA. Again, the purpose of the UTPA is to punish dilatory insurers: "The statute referred to by plaintiff is in the nature of a penalty to be assessed against insurers for dilatory practices in settling meritorious claims." *Fletcher*, 80 Mich App at 445. The multiple tenders of the arbitration award rejected by the appellant demonstrates that it is ***appellant and not MIC who has been, and continues to be, dilatory throughout***. Contrary to appellant's argument, the actions after the arbitration award only serve to demonstrate that the Court of Appeals reached the correct conclusion in this case.

II. THE TRIAL COURT'S DECISION NOT TO IMPOSE ATTORNEY FEE SANCTIONS WAS NOT CLEARLY ERRONEOUS GIVEN THAT APPELLANT FAILED TO PRESENT EVIDENCE THAT SANCTIONS WERE APPROPRIATE, FAILED TO PROVIDE THE INFORMATION ON FEES AND COSTS AS REQUESTED BY THE COURT, AND THEN DELAYED PROCEEDINGS BY YEARS BY FAILING TO MOVE TO START THEIR REQUESTED ARBITRATION

A. Standard of Review

This Court reviews a trial court's decision to deny sanctions for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 661-662.

B. Preservation of the Issue

This issue was not preserved for appeal because the Nickolas abandoned the issue by failing to comply with the trial court's order to supply information regarding the Nickolas' claimed fees, costs, and expenses as ordered in the March 6, 2006 Order. (Appendix 15) By failing to comply with the trial court's order, the Nickolas' abandonment amounts to a waiver of this issue. "A waiver is a voluntary relinquishment of a known right." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008), quoting *Dahrooge v Rochester-German Ins Co,* 177 Mich 442, 451-452; 143 NW 608 (1913). "'Waiver is the intentional relinquishment of a known right. The usual

manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.' *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958) (citations omitted and emphasis added)." *Cadle Co v City of Kentwood*, 285 Mich App 240, 254-55; 776 NW2d 145 (2009). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Id.*, citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

C. The Court of Appeals Properly Ruled that This Issue was Abandoned in the Trail Court Years Ago

During the original trial court proceedings, the Nickolas argued that they faced increased costs and fees due to a delay in MIC agreeing to arbitration. They sought MCR 2.114 sanctions against MIC because of this. But the record reflects that, when MIC's attorney was able to obtain a certified copy of the policy, he agreed to arbitration and asked that the case be dismissed and sent to arbitration. (Appendix 10) On hearing the MCR 2.114 sanctions motion, the trial court noted that the Nickolas had not supported their claim of prejudice/claim for sanctions with any information to show any unnecessary delay or that delay's claimed extent. The trial court asked that the Nickolas submit the required information to support their February 2006 motion. (Appendix 14, pp 16-17) The court noted that it could not decide the issue on the record presented by the Nickolas: "Well, I need to look at, at some point in time, you agreed to go to arbitration, what happened in the period of time before that and how much time elapsed." (Appendix 14, p 17) The Court then specifically instructed that the rest of the case could proceed to arbitration while the trial court contemporaneously decided the motion for sanctions:

> THE COURT: If you want to send it to arbitration - - if you want to do an order sending it to arbitration and leaving this part with me, go ahead and do it. Then you won't hold up on that. [Appendix 14, p 18.]

The proceedings ended with a promise by the Nickolas to provide the requested information necessary to support their motion: "We'll crystallize those facts and issues for you, Your Honor. Thank you." (Appendix 14, p 17[7]) This proceeding occurred on February 14, 2006, ***but the Nickolas did nothing in 2006, nothing in 2007, nothing in 2008, nothing in 2009, nothing in 2010, nothing in 2011, and nothing in 2012***. ***More than seven years passed*** before Joseph Nickola returned to court and simply raised the same claimed right to sanctions without any attempt to comply with the Court's 2006 order. (Appendix 14, p 17; Appendix 17)

The decision to do absolutely nothing was certainly not the trial court's fault and can be blamed on no one other than the Nickolas and their subsequent representative. The decision to do absolutely nothing for the better part of the decade is completely inexcusable. But even less excusable is the decision to ***never comply with the trial court's 2006 order to supply the list of costs, expenses, and fees to document the claimed unnecessary delay to this day***. Appellant attempts to argue that there was no repeated failure to comply with the trial court's order. (Application, p 27) But as the Court of Appeals properly noted, "waiver may be shown by a course of conduct, including neglecting and failing to act. . . ." *Nickola*, __Mich App at slip op p 4, citing *Candle Co*, 285 Mich App at 254-255. ***Each day that the Nickolas and the appellant have not complied with the trial court's order, for well over nine years now, is a reaffirmation of their waiver of this issue***. "Waiver is the intentional relinquishment of a known right. . . by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive." *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958). The Court of Appeals

[7] Appellant now claims that the trial court reserved the decision "for after completion of the arbitration process." (Application, p 23) This assertion is blatantly false in light of the actual statements made by the Court and the Nickolas' attorney at the time the order was entered as quoted above. The fact that the Nickolas' attorney did not actually believe the issue was reserved for after the end of arbitration is conclusively demonstrated by the fact that he failed to comply with the trial court's order even after arbitration ended.

properly found that the issue was waived. Appellant concedes as much in his application when he states "The Order ***required*** Plaintiffs' counsel to provide the Court and defense Counsel with itemized costs and attorney fees. . . ." (Application, p 5, emphasis added) The Nickolas and appellant ***never did so despite admitting that the Court's order required them to do so.*** This admitted failure to act is a quintessential waiver of the issue.

Appellant argues that the *Nickolas* did not have to supply the requested records to the trail court because they should not have been required to do so until there was a hearing on attorney fees pursuant to *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). (Application, pp 27-28) First, the disagreement with a trial court's order does not provide a party the right to simply ignore the trial court's order. If the Nickolas actually thought that the order was legally wrong, they could have filed a motion for rehearing or filed an interlocutory appeal. What they could not do was simply ignore the court's ruling. The decision to simply ignore the trial court's had the consequences of waiving the issue.

Moreover, appellant's argument is a misreading of *Smith*. *Smith* does not require automatic hearings in every case where someone claims a right to attorney fees. It notes that ***the person claiming the fees bears the burden of demonstrating their reasonableness***. *Id*. at 528-529. The case further states that "***The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness***." *Id*. at 532, emphasis. It is only after the records are submitted that a hearing would occur pursuant to *Smith*: "***The party opposing the fee request*** is entitled to an evidentiary hearing ***to challenge the applicant's evidence***. . . ." *Id*. emphasis added. Simply, the trial court had the right to develop the record as it saw fit. It wanted to establish actual delay during the trial court proceeding after the complaint was answered, which would be the only time relevant for MCR 2.114. Thus, the

trial court set a legitimate first step, completely consistent with this Court's ruling in *Smith*, to provide supporting records. ***But the Nickolas never met the first step, and thus, there was no need for a hearing.***

Regardless, a fundamental and foundational maxim of our legal system in Michigan is that a party seeking equity must have acted with equity in the case: "He that seeks equity must do equity to him from whom he requires it. . . ." *Baker v Pierson*, 6 Mich 522, 544 (1859). In this case, appellants fault the trial court for not sanctioning MIC for some small period of delay, which the Nickolas never documented, before agreeing to allow the case to proceed to arbitration. But in light of what occurred afterward, the claim is ridiculous. The Nickolas and their representatives sat on the case for ***more than six years*** doing absolutely nothing. It would be absolutely ludicrous to sanction one party for a claimed, but never documented, delay of months for the benefit of a party that indisputably in turn delayed the case ***for years***. As Moliere stated: "One should examine oneself for a very long time before thinking of condemning others." (<http://www.quotehd.com/quotes/moliere-quote-one-should-examine-oneself-for-a-very-long-time-before-thinking> Accessed, November 16, 2015)

Simply, this issue was abandoned long ago and is not ripe for appellate review. The documented delay in this case was caused by the Nickolas and their representative. The trial court's decision not to impose sanctions on either side in light of these facts is not clearly erroneous.

D. Even if this Issue Were Not Waived, No Sanctions Were Appropriate

Even if the Nickolas had not decided to abandon this issue years ago be failing to comply with the trial court's order, there is no basis to impose sanctions in this case. MIC and its attorney did not violate the court rules in its answer to the complaint. Therefore, the trial court did not err in refusing to impose sanctions.

The Nickolas moved for sanctions pursuant to MCR 2.114. (Appendix 12) MCR 2.114(D) and (E) provide:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

This court rule is specifically based on pleadings. But appellant fails to specifically articulate exactly what pleading appellant claims violated this rule or how exactly the filing was inappropriate. Appellant's major attack seems to be nothing more than MIC should have agreed to arbitration in the first place before the litigation stated. (Appellant Brief, pp 27-28) But the purpose of the court rule is "deterring frivolous legal claims and defenses. . ." *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 714 n1; 591 NW2d 676 (1998). "MCR 2.114(D) and (E) can be applied only to a person who has filed a 'pleading,' as defined in MCR 2.110(A)." *Bechtold v Morris*, 443 Mich 105, 108; 503 NW2d 654 (1993). The court rule has nothing to do with events occurring before litigation even began.

Looking at the answer filed in this case by MIC, which is the only pleading that can be at issue, it contains no false statements or improper defense. MIC's attorney Brickley carefully answered the complaint with the information available to him. Brickley prepared the answer to

the complaint to the best of his ability without being able to obtain the specific insurance policy. (Appendix 10) For information he did not have regarding the specific terms if the policy, Brickley answered that the allegations were neither admitted nor denied. (Appendix 11, ¶ 12; Appendix 10) The facts in this case show no bad faith or improper conduct in filing this answer.

Appellants' other avenue of attack appears to be to argue that answering the complaint without the benefit of the insurance policy violates the "reasonable inquiry" rule. (Application, p 27) There is no factual or legal basis for this argument, and it fails to account for the realities of the insurance industry and corresponding litigation. MIC is a large company that provides insurance coverage in nearly every state in the Union. (See <https://eapps.naic.org/cis/writingReport.do?entityId=5331> Accessed November 16, 2015) It has tens of thousands of customers and multiple different insurance policies and forms. These forms and policies evolve and change over time. To obtain a policy, a formal request has to be made so that the relevant department can research, put together, certify, and issue the correct policy for the correct insured during the correct policy period. Contrary to appellants' bold assertion that "the insurer certainly knew what its own insurance policy said" (Application, p 27), neither MIC's employees nor its retained attorneys can possibly memorize all of multiple different forms and policies in existence. In this case, Brickley requested the policy, but he could not obtain it prior to the time to answer the complaint.[8] (Appendix 10) The court rule requires nothing more than this reasonable inquiry into the facts, which is what Brickley attempted by requesting the certified policy. Any other conclusion would require sanctions in every case that is eventually lost, as the end determined facts would be different than those

[8] There is nothing unusual in delays and difficulties in obtaining policies. See *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 73; 755 NW2d 563 (2008), where the Secura policy was never located or obtained.

alleged in the initial pleadings. "That the alleged facts are later discovered to be untrue does not invalidate a prior reasonable inquiry." *Jerico Constr Inc v Quadrants Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003), lv den 469 Mich 1010 (2004).

Appellant now claims that MIC lied to its attorney or hid the policy from their attorney. (Application, p 27) There is absolutely no support for this position. If MIC was actually attempting to mislead everyone on this point, they could have submitted the wrong policy form or never supplied the certified policy at all. The fact that they obtained the correct certified policy and submitted it to Brickley shortly after the answer demonstrates that MIC had no ill intent in this matter. Instead, MIC merely made a mistake in determining what underinsured motorist policy form applied to the claim. It corrected this mistake as soon as it could and specifically asked to send the case to arbitration. It was the Nickolas who then refused to do so. (Appendix 10) What appellant really wants is a rule that an insurer should be sanctioned whenever it makes a mistake regarding the contents of its policy. There is no logical or legal reason to create such a rule, and MCR 2.114 is certainly not applicable to create appellant's desired punishment.

Further, it has been noted that it is appropriate to deny sanctions where the party "has not shown that the petition was filed solely to harass or cause a needless increase in the cost of litigation". *Nielsen v Nielsen*, 163 Mich App 430; 415 NW2d 6 (1987). Applying this rule to the case at hand supports affirming the trial court's decision not to impose sanctions. No bad faith or dilatory activity existed on the part of MIC or its attorney at the time. This is demonstrated by the undisputed fact that, once Brickley obtained the certified policy, he agreed to dismiss the action and allow the case to proceed to arbitration. It was the Nickolas who refused and required that the litigation continue and then subsequently delayed for years for no reason at all. Given

that the facts do not show abusive process in this case, the trial court's decision does not fall outside of the principled range of outcomes in this matter. The application should be denied.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals properly applied MCL 500.2006 and MCR 2.114 in this matter. There is no basis or need to appeal to this Court. MIC respectfully requests that this Honorable Court deny leave to appeal and impose any costs associated with this appeal on appellant.

CERTIFICATE OF SERVICE
I hereby certify that the foregoing pleading has been electronically filed on the below listed date with the Clerk of the Court via the Electronic Case Filing system which will send notice of filing to all attorneys of record.

/s/ *Dana L. Pavelek*
Legal Assistant, Harvey Kruse, P.C.
DATED: November 24, 2015

Respectfully submitted,

BY: */s/ Michael F. Schmidt*
Michael F. Schmidt P25213
Nathan Peplinski P66596
Harvey Kruse PC
mschmidt@harveykruse.com
npeplinski@harveykruse.com
1050 Wilshire Drive, Suite 320
Troy, Michigan 48084-1526
(248) 649-7800

Appendix 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and
THELMA NICKOLA

Plaintiffs,

05 - 81192

FILE NO. 05- -CK

v

JUDGE RICHARD B. YUILLE
P-22664

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE

Defendant.

JOHN D. NICKOLA (P18295)
Attorney for Plaintiff
1015 Church Street
Flint, MI 48502
(810) 767-5420
(810) 767-4719

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint

COMPLAINT FOR DECLARATORY RELIEF AND/OR DAMAGES

NOW COMES Plaintiffs, George and Thelma Nickola, by thier attorney, John D. Nickola, and for thier Complaint for Declaratory Relief and/or Damages, states as follows:

1. That in this case, a controversy exists in excess of Twenty-Five Thousand ($25,000.00) Dollars, within the jurisdiction of the County of Genesee, State of Michigan, and the Genesee County Circuit Court is a proper Court of record to declare the rights and other legal relationships of the interested Parties.

2. That Plaintiffs, George and Thelma Nickola are husband and wife at all pertinent times were residents of Midland County, Michigan.

3. That the Defendant, MIC General Insurance Corporation, d/b/a GMAC Insurance (hereinafter GMAC) is domiciled and licensed in the State of Missouri and conducts business in Genesee County, State of Michigan.

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

4. That on or about the 13th day of April 2004, Plaintiffs were insured with the Defendant GMAC, Policy Number 0318316A03M01, said automobile insurance policy providing coverage for under-insured motorist coverage for the protection of said Plaintiffs, George and Thelma Nickola. (See Attached **Exhibit A**, Declaration Page)

5. That on or about the April 13, 2004 the Plaintiff Thelma Nickola was a passenger in a vehicle being driven by George Nickola, said vehicle being insured by the above policy.

6. That at the above time and place George Nickola was operating his vehicle near the intersection of Corunna Road and Elms Road, in the County of Genesee and State of Michigan when George Nickola's vehicle was struck by an oncoming vehicle that failed to yield the right of way to oncoming traffic, said vehicle being owned and driven by Roy Smith.

7. That as a result of the striking of the Nickola vehicle Plaintiff, George Nickola , sustained serious, permanent and/or painful injuries to his person, resulting in a serious and/or permanent impairment of a bodily function, and/or serious and/or permanent disfigurement and the loss of consortium of his wife's society, companionship and services.

8. That as a result of the striking of the Nickola vehicle Plaintiff, Thelma Nickola , sustained serious, permanent and/or painful injuries to her person, resulting in a serious and/or permanent impairment of bodily function, and/or serious and/or permanent disfigurement and loss of consortium of her husband's society, companionship and services.

9. That the maximum automobile liability insurance coverage limit that was available from the tortfeasor, Roy Smith was Twenty Thousand dollars ($20,000.00) to George Nickola and Twenty Thousand dollars ($20,000.00) to Thelma Nickola and the amount of $20,000.00 was paid by the tortfeasor to each of the Plaintiffs herein with the Defendant's knowledge, consent and acquiescence. (See Attached **Exhibit B**)

10. That Defendant GMAC's insurance policy, referenced above, provided **under**insured motorist coverage to George and Thelma Nickola in the amount of One Hundred Thousand dollars ($100,000) for each person, Three Hundred Thousand dollars ($300,000.00) per accident (Refer to Exhibit A, Declaration Page.)

11. That Plaintiffs, George and Thelma Nickola were underinsured motorists pursuant to the definitions set forth in Defendant GMAC's policy.

12. That Defendant GMAC's policy provided that if the insurer (Defendant GMAC) and the insured (George and Thelma Nickola) do not agree whether the insured person is legally entitled to recover damages or as to the amount of damages, either party may make a written demand for arbitration. (See Underinsured Motorist Protection Section, Attached Exhibit C)

13. That on February 22, 2005 Plaintiffs did make a written demand for arbitration of George and Thelma Nickola's underinsured motorist claims against the Defendant GMAC (See Attached Exhibit D)

14. That on March 2, 2005 Defendant GMAC denied Plaintiff's demand for arbitration and in response stated "we do not agree to placing this matter into an arbitration forum" (See attached exhibit E)

15. That the Plaintiffs have each complied with all of the provisions of the said policy.

16. That there exists an actual controversy which requires a declaration of the rights and legal relations of the parties herein.

WHEREFORE, the Plaintiff prays that this Court will:

A. Issue an Order declaring that the rights and legal relations of the parties herein; and/or

B. Issue an Order directing the Defendant GMAC, to arbitrate this matter in accordance with the terms under the policy, and/or;

C. To enter Judgment on behalf of the Plaintiff, George Nickola, in the amount of Eighty Thousand ($80,000.00) Dollars, together with all costs, interest and attorney fees allowed by law;

D. To enter Judgment on behalf of the Plaintiff, Thelma Nickola, in the amount of Eighty Thousand ($80,000.00) Dollars, together with all costs and interest allowed by law;

E. That this Court shall retain jurisdiction to enforce compliance and/or make other determinations, orders and judgments necessary to fully adjudicate the rights of the Plaintiffs herein.

Date: 4/8/05

JOHN D. NICKOLA (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 2

GMAC INSURANCE

DECLARATIONS PAGE
PAGE 1

GM EMPLOYEE
VEHICLE INSURANCE
P.O. BOX 66937
ST. LOUIS,MO 63166-6937

To Report Claims Toll Free 1-800-642-2886
For Other Services or Information 1-800-642-6464

Policy Period 12:01 AM Standard Time (see reverse side)
From 03/15/2004 To 03/15/2005
POLICY NUMBER 0318316A04M

GEORGE NICKOLA
362 W ISLAND DR
BEAVERTON MI 48612-8525

PERSONAL AUTOMOBILE

VEHICLE INSURANCE

A VALUED CUSTOMER SINCE 2001

* * RENEWAL DECLARATIONS PAGE * *

... THANK YOU FOR YOUR BUSINESS ... 486128525071 73 MI20040213

COVERAGE AFFORDED	LIMITS	VEHICLE #1 1996 CVAN ASTRO 1GBDM19W5T8112-602	VEHICLE #2 1989 CHEV C1500 1GCDC14K6KE113-564	VEHICLE #3
LIABILITY BODILY INJURY EACH PERSON EACH ACCIDENT	 $100,000 $300,000	 107.00	 112.00	
PROPERTY DAMAGE EACH ACCIDENT	$100,000	12.00	13.00	
ADDITIONAL PROPERTY DAMAGE		INCLUDED	INCLUDED	
PERSONAL INJURY PROTECTION TWO OR MORE FAMILY MEMBERS WAIVER OF WORK LOSS ANNUAL INCOME UNDER $3,000		290.00	374.00	
PROPERTY PROTECTION INS		15.00	15.00	
UNINSURED MOTORISTS BI EACH PERSON EACH ACCIDENT	 $100,000 $300,000	 22.00	 22.00	
UNDERINSURED MOTORISTS BI EACH PERSON EACH ACCIDENT	 $100,000 $300,000	 20.00	 20.00	
DAMAGE TO YOUR AUTO OTHER THAN COLLISION	$100 DED	193.00	NO COVERAGE	
BROADENED COLLISION	$500 DED	318.00	NO COVERAGE	
VEHICLE PREMIUM		$977.00	$556.00	
++++++++++++++++++++++++++++ VEHICLE PREMIUM BASED ON -USE OF VEHICLE -RATED DRIVER -DISCOUNTS APPLIED		 PLEASURE ADULT ANTI-LOCK BRAKE BELT PLEDGE MULTI-VEHICLE	 PLEASURE ADULT BELT PLEDGE MULTI-VEHICLE HOMEOWNER	

SEE NEXT PAGE

#1 _____ #2 _____ #3 _____
Loss Payees

17 803100 10 803100

Underwritten by: **MIC GENERAL INSURANCE CORP.**

4336(10011994)

GMAC INSURANCE

DECLARATIONS PAGE

GM EMPLOYEE
VEHICLE INSURANCE
P.O. BOX 66937
ST. LOUIS,MO 63166-6937

To Report Claims Toll Free 1-800-642-2886

For Other Services or Information 1-800-642-6464

Policy Period 12:01 AM Standard Time (see reverse side)
From 03/15/2004 To 03/15/2005
POLICY NUMBER 0318316A04M

GEORGE NICKOLA
362 W ISLAND DR
BEAVERTON MI 48612-8525

PERSONAL AUTOMOBILE

VEHICLE INSURANCE

A VALUED CUSTOMER SINCE 2001

* * RENEWAL DECLARATIONS PAGE * *

... THANK YOU FOR YOUR BUSINESS ... 48612852507173 MI20040213 0

COVERAGE AFFORDED	LIMITS	VEHICLE #1 1996 CVAN ASTRO 1GB0M19W5T8112-602	VEHICLE #2 1989 CHEV C1500 1GCDC14K6KE113-564	VEHICLE #3
-DISCOUNTS APPLIED		AIRBAG HOMEOWNER PAID IN FULL	PAID IN FULL	
TOTAL POLICY PREMIUM	$1,533.00			

#1 _____ #2 _____ #3 _____

Loss Payees

17 803100 10 803100

Underwritten by: **MIC GENERAL INSURANCE CORP.**

0318316A04:04,17

Endorsements made a part of this policy at issuance:

1779(10012002) 4886(07012003) 1933(05012000) 4935(08012001) 6159(03012000)
5933(05012000) 6451(10012001) 2439(06011994) 2441(11011994) 1880(04011988)
4497(12012000) 2082(12011989) 4477(08011987) 1825(01011988) 4658(02012000)
5962(04012000) 6637(09012003) 6638(09012003)

4370(10011994)

POLICY PERIOD: (Applicable in all states except Texas and Wisconsin)

The policy shall expire as shown in Policy Period of the declarations, except that it may be continued in force for successive policy periods by the payment of the required renewal premium in advance of each such period and the acceptance of such premium by a duly authorized representative of the company. Each such policy period shall begin and expire at 12:01 A.M. Standard Time at the address of the named insured on the declarations. The premium shown in the policy is for the stated policy period. If renewed, the successive policy periods shall be of the same duration as shown on the declarations.

LOSS PAYABLE CLAUSE: (Applicable in all states except California, Virginia and Tennessee)

Any physical loss or damage payable under this policy shall be paid as interest may appear to you and the loss payee shown in the declarations. When we pay the loss payee we shall to the extent of the payment, be subrogated to the loss payee's rights of recovery. This insurance covering the interest of the loss payee shall not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of your covered auto. However, we reserve the right to cancel the policy as permitted by policy terms and the cancellation shall terminate this agreement as to the loss payee's interest. Upon termination of the policy or the coverages insuring the loss payee's interest, we will give at least 10 days advance notice of termination to the loss payee (20 days in the state of Arkansas). Any continuance of coverage protecting the loss payee's interest shall terminate on the effective date of the policy contract of insurance binder for similar coverage by another insurance carrier.

Please refer to your policy for a complete description of provisions which control all policy terminations and expirations.

4337(10011994)

I HEREBY CERTIFY THAT THIS IS A TRUE AND EXACT REPRODUCTION OF THE DECLARATIONS SHOWING COVERAGES CARRIED BY THE ABOVE NAMED INSURED AS OF APRIL 13, 2004

Peggy O'Neal
PEGGY O'NEAL CALL CENTER SUPPORT SUPERVISOR

COUNTY OF ST. LOUIS
STATE OF MISSOURI

SWORN TO AND SUBSCRIBED BEFORE ME THIS 4th DAY OF May 2005

NOTARY PUBLIC Denise Weber

DENISE WEBER
Notary Public - Notary Seal
STATE OF MISSOURI
St. Charles County
My Commission Expires: June 20, 2008

Appendix 3

GMAC Insurance

October 14, 2004

John D. Nickola, Esquire
1015 Church Street
Flint, MI 48502

RE:		
	Company Name:	MIC General Insurance Company
	Claim Number:	7297040
	Insured:	Nickola,George
	Claimant:	Nickola,George & Nickola,Thelma J
	Date of Loss:	04/13/2004

Dear Mr. Nickola:

This letter follows our investigation into your request to accept the tortfeasor's policy limits of $20,000. Please be advised that you have our permission to accept the Progressive policy limits, as the tortfeasor is uncollectable.

The $20,000 will resolve any outstanding third party claims, except the umbi coverage and pip benefits.

Thank you, for your attention to these matters and we ask that you forward a copy of the signed release once this matter is resolved.

Sincerely,

Gregory D. Edwards
Inventory Manager
(888) 737-8460, Ext. 5013
(248) 226-5013 Fax: (248) 226-5550
Motors Insurance Company a GMAC Insurance Company

GMAC Insurance
300 Galleria Office Center #401 / PO Box 5123
Southfield, MI 48086-5123
www.gmacinsurance.com

E

Appendix 4

PROGRESSIVE®

FULL RELEASE OF CLAIMS

Claim #042709197

KNOW ALL BY THESE PRESENTS, THAT **George Nickola, a married man and his wife, Thelma Nickola, both individually and as husband and wife** for and in consideration of the payment **of Twenty Thousand Dollards and no cents ($20,000.00),** the receipt and sufficiency of which is hereby acknowledged, does (do) hereby for myself (ourselves) and for my (our) heirs, executors, administrators, successors, assigns and any and all other persons, firms, employers, corporations, associations, or partnerships release, acquit and forever discharge **Roy D. Smith** and his, her, their or its agents, servants, successors, heirs, executors, administrators, from claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, loss of consortium, loss of service, and any compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of an accident which occurred on or about **April 13, 2004**, at or near **Corunna Road and Elms Road in Flint, Michigan.**

It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries and damage, and that neither this release, nor the payment pursuant thereto, shall be construed as an admission of liability, such being denied.

The undersigned hereby declare(s) and represent(s) that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite and in making this release, it is understood and agreed that the undersigned rely(ies) wholly upon the undersigned's judgment, belief, and knowledge of the nature, extent, effect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties being released, or their representatives, or by any physician or surgeon by them employed.

This release does not include any claim for any applicable Michigan No-Fault benefits nor include any claim that George and/or Thelma Nickola have against any insurance company for any and all applicable uninsured/underinsured motorist coverage and/or other applicable benefits that may be due and/or available to them.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

George Nickola 11/21/04
Signed, George Nickola, claimant — Date

[signature] 11-21-04
Witness — Date

Thelma J. Nickola 11/21/04
Signed, Thelma Nickola, spouse — Date

[signature] 11-20-04
Witness — Date

PROGRESSIVE®

FULL RELEASE OF CLAIMS

Claim #042709197

KNOW ALL BY THESE PRESENTS, THAT **Thelma Nickola, a married woman and her husband, George Nickola, both individually and as husband and wife** for and in consideration of the payment of **Twenty Thousand Dollards and no cents ($20,000.00)**, the receipt and sufficiency of which is hereby acknowledged, does (do) hereby for myself (ourselves) and for my (our) heirs, executors, administrators, successors, assigns and any and all other persons, firms, employers, corporations, associations, or partnerships release, acquit and forever discharge **Roy D. Smith** and his, her, their or its agents, servants, successors, heirs, executors, administrators, from claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, loss of consortium, loss of service, and any compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of an accident which occurred on or about **April 13, 2004**, at or near **Corunna Road and Elms Road in Flint, Michigan.**

It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries and damage, and that neither this release, nor the payment pursuant thereto, shall be construed as an admission of liability, such being denied.

The undersigned hereby declare(s) and represent(s) that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite and in making this release, it is understood and agreed that the undersigned rely(ies) wholly upon the undersigned's judgment, belief, and knowledge of the nature, extent, effect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties being released, or their representatives, or by any physician or surgeon by them employed.

This release does not include any claim for any applicable Michigan No-Fault benefits nor include any claim that George and/or Thelma Nickola have against any insurance company for any and all applicable uninsured/underinsured motorist coverage and/or other applicable benefits that may be due and/or available to them.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Thelma J. Nickola 11/21/04
Signed, Thelma Nickola, claimant — Date

[signature] 11-21-04
Witness — Date

George Nickola 11/21/04
Signed, George Nickola, spouse — Date

[signature] 11-21-04
Witness — Date

Appendix 5

PP 03 11 12 89

UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":

1. Sustained by an "insured"; and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle".

We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

B. "Insured" as used in this endorsement means:

1. You or any "family member".
2. Any other person "occupying your covered auto".
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

C. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.

However, "underinsured motor vehicle" does not include any vehicle or equipment:

1. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.
2. Owned by or furnished or available for the regular use of you or any "family member".
3. Owned by any governmental unit or agency.
4. Operated on rails or crawler treads.
5. Designed mainly for use off public roads while not upon public roads.
6. While located for use as a residence or premises.
7. Owned or operated by a person qualifying as a self-insurer under any applicable motor vehicle law.
8. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
   a. denies coverage; or
   b. is or becomes insolvent.

EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for "bodily injury" sustained by any person:

1. While "occupying", or when struck by, any motor vehicle owned by your or any "family member" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.
2. While "occupying" "your covered auto" when it is being used as a public or livery conveyance. This exclusion (A.2.) does not apply to a share-the-expense car pool.
3. Using a vehicle without a reasonable belief that that person is entitled to do so.

B. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:

1. workers' compensation law; or
2. disability benefits law.

C. We do not provide Underinsured Motorists Coverage for punitive or exemplary damages.

LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds";
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

However, the limit of liability shall be reduced by all sums paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally

responsible. This includes all sums paid under Part A of this policy.

B. Any amounts otherwise payable for damages under this coverage shall be reduced by all sums paid or payable because of the "bodily injury" under any of the following or similar law:

1. workers' compensation law; or

2. disability benefits law.

C. Any payment under this coverage will reduce any amount that person is entitled to recover under Part A of this policy.

D. No one will be entitled to receive duplicate payments for the same elements of loss.

OTHER INSURANCE

If there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

ARBITRATION

A. If we and an "insured" do not agree:

1. Whether that person is legally entitled to recover damages under this endorsement; or

2. As to the amount of damages;

Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

B. Each party will:

1. Pay the expenses it incurs; and

2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the "insured" is legally entitled to recover damages; and

2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

ADDITIONAL DUTY

Any person seeking coverage under this endorsement must also promptly send us copies of the legal papers if a suit is brought.

Appendix 6

BOARD CERTIFIED
CIVIL TRIAL SPECIALIST

LAW OFFICES OF
JOHN D. NICKOLA
1015 CHURCH STREET
FLINT, MI 48502

TELEPHONE
(810) 767-5420

FAX
(810) 767-4719

February 8, 2005

GMAC Insurance
Mr. Gregory Edwards
P.O. Box 3488
Ontario, California 91761-0949

RE:	My Clients/Your Insureds:	George Nickola and Thelma Nickola
	Claim No.:	7297040
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004

Dear Mr. Edwards:

As you know on October 19, 2004, GMAC authorized my clients acceptance of the tortfeasors policy limits in the amount of $20,000 for Thelma Nickola and $20,000 for George Nickola.

Enclosed are a copy of the executed releases pertaining to the resolution of the claim against Roy D. Smith.

You have had ample opportunity to review the medical records of my clients, which clearly demonstrate the substantial injuries suffered by both Thelma and George Nickola in this crash.

At this time I am requesting payment of the full remaining undersinsured limits available, $80,000.00 each to George and Thelma Nickola, pursuant to their Underinsured Motorist Coverage in their policy.

If you have any questions, or you need additional information before full payment can be made, please advise immediately.

Sincerely,

John D. Nickola

Appendix 7

GMAC Insurance

February 17, 2005

Mr. John Nickola, Esquire
1015 Church Street
Flint, MI 48502

RE:		
	Company Name:	Motors Insurance Company
	Claim Number:	7297040
	Insured:	George Nickola
	Claimant:	George & Thelma Nickola
	Date of Loss:	04/13/2004

Dear Mr. Nickola:

Thank you, for your recent letter regarding your clients demands. At this time, we must deny your client's claims for underinsured motorist coverage. Our investigation has revealed that your client's were compensated by the tortfeasor for a combined total of $40,000.

We believe your client's were adequately compensated for their pre-existing injuries, which were aggravated in the accident. Your client's appear to be able to lead their normal life as described in the Kreiner decision. If however, you have some additional information that you want me to review, please forward the medical records and I will be happy to review the matter again.

Sincerely,

Gregory D. Edwards
Claim Representative II
(888) 737-8460, Ext. 5013
(248) 226-5013 Fax: (248) 226-5550
MIC General Insurance Company a GMAC Insurance Company

GMAC Insurance
300 Galleria Office Center #401 / PO Box 5123
Southfield, MI 48086-5123
www.gmacinsurance.com

14

Appendix 8

BOARD CERTIFIED
CIVIL TRIAL SPECIALIST

LAW OFFICES OF
JOHN D. NICKOLA
1015 CHURCH STREET
FLINT, MI 48502

TELEPHONE
(810) 767-5420

FAX
(810) 767-4719

February 22, 2005

CERTIFIED MAIL

GMAC Insurance
Mr. Gregory Edwards
P.O. Box 3488
Ontario, California 91761-0949

WRITTEN DEMAND FOR ARBITRATION/S

RE:	My Client/Your Insured:	Claim #1: George Nickola and Thelma Nickola for Bodily Injury to George Nickola
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004
	My Client/Your Insured:	Claim #2: Thelma Nickola and George Nickola for Bodily Injury to Thelma Nickola
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004

Dear Mr. Edwards:

Pursuant to the underinsured motorists coverage terms of my clients' GMAC policy, please consider this letter as written demand for arbitration for the injuries to each of them.

If you do not respond to my demand in seven days you leave me no choice other than file suit to force arbitration.

If you have any questions please do not hesitate to contact this office.

Sincerely,

John D. Nickola

Appendix 9

GMAC Insurance

March 1, 2005

Mr. John D. Nickola, Esquire
1015 Church Street
Flint, MI 48502

Re: Company Name- Mic General Insurance Corp
Insured- Nickola,George & Thelma
Claim Number- 7297040
Policy Number- 0318316A04
Date Of Loss- 04/13/2004
Your Clients- George & Thelma Nickola

Dear Mr. Nickola:

Thank you for your recent letter, which we received February 28, 2005.

Please be advised that the above policy does not provide automatic coverage for uninsured/underinsured motorists' arbitration. However, our policy does contain an **Uninsured Motorist Coverage Part**, with a section entitled; Arbitration. This section states in part: "Both we and the insured must agree to arbitration." We; do not agree to placing this matter into an arbitration forum. I am sorry we cannot be of assistance in this matter.

If you have any questions, please call me at (888) 233-4575 x5013.

Sincerely,

Gregory Edwards
Claims Representative
MIC General Insurance Corp, a GMAC Insurance Company

GMAC Insurance
Gregory Edwards
PO Box 5123
Southfield, MI 48086-5123
(888) 233-4575 x5013
www.GMACInsurance.com

Appendix 10

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE,

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

AFFIDAVIT OF WILLIAM J. BRICKLEY

STATE OF MICHIGAN

ss.

COUNTY OF GENESEE

1. I, William J. Brickley, am the attorney involved in the defense of this matter.

2. I prepared the Answer to the Complaint.

3. At the time I prepared the Answer to the Complaint I did not have a certified copy of the policy at issue.

4. After answering the Complaint I then received a certified copy of the policy.

5. At that time I noted that the uninsured motorist provision of the policy did

indicate that arbitration was discretionary and that both sides had to give permission in order to go arbitration.

6. I also noted that the underinsured motorist portion of the policy did indicate that arbitration was mandatory upon the demand anyone party.

7. Upon review of the policy I did indicate to counsel for the plaintiff that we would be willing to have the matter go to arbitration and all we needed to do was simply choose arbiters and to stipulate to a dismissal of the litigation.

8. Counsel for the plaintiff has refused requests for either.

9. Counsel for the plaintiff has indicated that until such time as his request for attorney fees is heard that he will not agree to go to arbitration or appoint an arbiter.

10. Counsel for the plaintiff has failed to articulate to this counsel any type of reasonable basis for his request that he or his clients are entitled to any type of attorney fees, costs, or other such relief.

11. That if counsel for the plaintiff would have agreed to simply have the matter go to arbitration once it was agreed that the policy provided for it the arbitration matter most probably could have been concluded by this time.

FURTHER DEPONENT SAYETH NOT

WILLIAM J. BRICKLEY P36716
Attorney at Law

Subscribed and sworn to before
me this 13th day of February, 2006.

Kristi L. Weber, Notary Public
Genesee County, MI.
My commission expires:10-3-07

Appendix 11

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL,

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

**ANSWER TO COMPLAINT,
NOTICE OF AFFIRMATIVE DEFENSES AND
RESERVATION OF RIGHT TO FILE ADDITIONAL,
SPECIAL AND/OR AFFIRMATIVE DEFENSES
AND JURY DEMAND**

The defendant, MIC GENERAL INSURANCE CORPORATION, d/b/a GMAC responds to the plaintiffs' complaint as follows:

1. Answering paragraph 1 of the complaint, defendant neither admits nor denies the amount in controversy, admit this Court has jurisdiction over the parties and the subject matter, but state that venue would be more appropriate in Midland County, the place where the plaintiffs' reside and where they treat.

2. Answering paragraph 2 of the complaint, defendant agrees that the plaintiffs

live in Midland County but can neither admit nor deny the remaining allegations contained in the paragraph because we do not know what is meant by the term "at all pertinent times."

3. Answering paragraph 3 of the complaint, defendant neither admits nor denies the domicile of the defendant but admits that the defendant does conduct business in Genesee County, State of Michigan. We further state that MIC is a separate insurance corporation which is wholly owned by GMAC.

4. Answering paragraph 4 of the complaint, defendant admits that a policy of insurance was issued by MIC General Insurance Corporation on the date as alleged but deny that the policy number listed is accurate and further deny that the insurance policy is attached as Exhibit A.

5. Answering paragraph 5 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

6. Answering paragraph 6 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

7. Answering paragraph 7 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

8. Answering paragraph 8 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

9. Answering paragraph 9 of the complaint, defendant admits same.

10. Answering paragraph 10 of the complaint, defendant admits that the policy was provided by MIC contained the provisions as alleged.

11. Answering paragraph 11 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

12. Answering paragraph 12 of the complaint, defendant neither admits nor denies the allegations contained therein and further states that a portion of the policy allegedly attached is not the proper portion of the policy.

13. Answering paragraph 13 of the complaint, defendant admits same.

14. Answering paragraph 14 of the complaint, defendant admits same.

15. Answering paragraph 15 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

16. Answering paragraph 16 of the complaint, defendant neither admits nor denies the allegations contained therein for lack of knowledge or sufficient information upon which to form a belief thereto and plaintiffs are left to their strict proofs thereof.

WHEREFORE, the defendant, MIC GENERAL INSURANCE CORPORATION, d/b/a GMAC, asks this Court to dismiss the plaintiffs' complaint with prejudice and render an award in favor of defendant, MIC GENERAL INSURANCE CORPORATION, d/b/a GMAC, as well as a ruling that the defendant is entitled to all actual costs and attorney fees so wrongfully incurred in having to defend this action.

Date: May 20, 2005

GARAN LUCOW MILLER, P.C.,

WILLIAM J. BRICKLEY P-36716
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

NOTICE OF AFFIRMATIVE DEFENSES AND RESERVATION OF RIGHT TO FILE ADDITIONAL, SPECIAL AND/OR AFFIRMATIVE DEFENSES

The defendant, MIC GENERAL INSURANCE CORPORATION, d/b/a GMAC, through their attorneys, GARAN LUCOW MILLER, P.C., states that they will rely upon the following affirmative allegations.

1. If, through discovery, it is found that either plaintiff was comparatively negligent in any way , we will assert said comparative negligence as a bar or set-off to the amounts that they may be entitled to receive.

2. If, through discovery, it is found that either plaintiff has failed to mitigate their damages as is required, we will seek a dismissal or a reduction in their claims for damages.

3. The Michigan No-Fault Automobile Insurance Act requires that either plaintiff to sustain a threshold injury. To the extent that either plaintiff has not sustained a threshold level injury, we will seek a bar or a dismissal of their claims for damages either by judge or jury.

4. The plaintiffs have not complied with all the provisions of the Michigan Court Rules with respect to the pleading of a claim for insurance benefits including the

attachment of the full policy to the Complaint and as a result this defendant cannot properly respond to all the various allegations.

5. The Defendant reserves the right to amend their answer, to include Additional Affirmative Defenses and/or Special Defenses upon completion of discovery, for the reason that Plaintiffs Service of Process was this Defendant's first knowledge and information of specific facts and circumstances, as alleged in Plaintiffs' Complaint, with reference to this Defendant's liability.

Date: May 20, 2005

GARAN LUCOW MILLER, P.C.,

WILLIAM J. BRICKLEY P-36716
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

DEMAND FOR TRIAL BY JURY

MIC GENERAL INSURANCE CORPORATION, d/b/a GMAC, defendant herein, by and through their attorneys, GARAN LUCOW MILLER, P.C., demands a trial by jury of this matter.

Date: May 20, 2005

GARAN LUCOW MILLER, P.C.,

WILLIAM J. BRICKLEY P-36716
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

Appendix 12

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

v

Hon. Richard B. Yuille

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC Insurance

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

PLAINTIFF'S MOTION TO CORRECT OR STRIKE PLEADINGS, IMPOSE SANCTIONS, TO ASSESS COSTS AND/OR FEES and REMOVE FROM ADR DOCKET

NOW COMES Plaintiffs, by their attorney, John D. Nickola, and says as follows:

1. That Plaintiffs were seriously injured in an automobile crash that occurred on April 13, 2004.

2. That the Plaintiff's were insured with Defendant GMAC at the time of the collision.

3. That the tortfeasor Roy Smith, was insured with Progressive Insurance Company.

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

5. That Plaintiffs' policy of insurance with the Defendant GMAC, provided Plaintiffs, among other coverages, with **under**insured motorist coverage in the amount of $100,000.00 each person, $300,000.00 each accident.

6. That the purpose of said **under**insured motorist coverage is to provide coverage to its policyholders in case a negligent driver with insufficient coverage causes damages in excess of the negligent driver's policy limits.

7. That on October 19, 2004, Gregory Edwards, Claim Representative of the Defendant GMAC, **provided written authorization** to Plaintiffs's attorney **allowing a settlement** between the Plaintiffs and the tortfeasor, Roy Smith, in the amount of $20,000.00 for each Plaintiff. (See attached **Exhibit A**)

8. That the settlement between Roy Smith and each of the Plaintiffs represented the full amount of liability limits of the tortfeasor's, Roy Smith, policy of insurance with Progressive Insurance.

9. That Plaintiffs' policy of insurance with Defendant GMAC states:

   A. If we and an "insured" do not agree:

      1. Whether that person is legally entitled to recover damages under this endorsement; or

      2. As to the amount of damages;

   Either party may make a written demand for arbitration. (See Attached **Exhibit B**)

10. That pursuant to the terms of GMAC's policy Plaintiffs, through their attorney, made a written demand for arbitration on February 22, 2005. (See Attached **Exhibit C**)

11. That on March 1, 2005 Defendant GMAC responded to Plaintiff's **under**insured motorist arbitration demand saying that the Plaintiffs' policy contained a provision that indicated

    "Both we and the insured must agree to arbitration" and we do not agree to placing this matter into an arbitration forum" (See Attached **Exhibit D**)

12. That Plaintiff then requested from GMAC a certified copy of Plaintiff's policy in effect on the date of their injuries to which GMAC responded and provided a certified copy of the policy, said certification dated March 4, 2005. (See Attached **Exhibit E**), which is totally inconsistent with the Defendant's posture outlined in paragraph 12 above as it relates to the Plaintiff's **under**insured motorist claim herein.)A complete copy of the policy in non-applicable in this Motion)

13. That on April 8, 2005, Plaintiff filed the instant suit to compel Arbitration.

14. That in Defendant's Answer to Plaintiff's Complaint Defendant admitted that Plaintiff had made a written demand for arbitration but alleged that arbitration was not agreed to by Defendant GMAC. (See Defendant's Answer to Complaint, paragraph 14, **Exhibit F**)

15. On August 24, 2005 Plaintiff filed Request for Admissions, said response being filed by Defendant on September 19, 2005 (See Attached Exhibit G) as follows:

    a. "Please admit that on March 4, 2005 a certified true and exact reproduction of the declarations showing coverages carried by George Nickola as of April 13, 2004 was produced and furnished by the Defendant to the Plaintiffs as evidenced by the attached declaration"

       Response: "Admit"

    b. "Please admit that the declaration indicates that endorsement 2082 (12011989) is an endorsement of that policy"

       Response: "Admit"

    c. "Please admit that endorsement 2082 (12011989) Attached as **Exhibit B** (within the Request document) is the applicable portion of Plaintiffs' policy in effect at the time of Plaintiffs' injury."

       Response: "Admit"

    d. "Please admit that endorsement 2082 (12000989) policy provides that if the Defendant and the "insured" do not agree whether the person is legally entitled to recover damages under that endorsement or as the amount of damages either party may make a written demand for arbitration."

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Response: "Admit"

e. "Please admit that Plaintiff did file a Formal Demand for Arbitration on February 22, 2004"

Response: "Admit"

f. "Please admit that Plaintiff is entitled to summary disposition in this matter."

Response: We can neither admit nor deny. The Request for Admission does not provide any information with respect to the basis of summary disposition, the grounds or any other information that would allow this defendant to prepare an adequate response."

16. The Defendant's answer, claiming that their permission must be obtained to agree to arbitration and their assertion that they did not agree to placing the matter into arbitration forum **is false**, and that such denial is not well grounded in fact, nor warranted by existing law or good faith argument for the extension, modification or reversal of existing law.

That since there is no dispute between the parties that Plaintiff has complied with the provisions set forth within Defendant's policy, Plaintiff is entitled to an order by this Court directing the Defendant to Arbitrate the Plaintiff's Claim.

17. Such allegations in the answer, certainly shows that the Defendant had not read the document prior to filing an answer.

18. That it is clear at this point, that the answer, filed by the Defendant, certainly was only interposed to harass and/or cause unnecessary delay and/or needlessly increase the cost of litigation.

19. That the said unfounded answer filed by the Defendant, is subject to the requirements of MCR 2.114 as is provided by MCR 2.111.

20. That said answer is not consistent with MCR 2.114 and that the policy provided by the Defendant did not require the Defendant's agreement as a condition precedent to this matter being arbitrated as the Plaintiffs had requested.

21. That the said signing and filing of the answer by the Defendant and/or its agents, is in violation of the Michigan general Court Rules and that pursuant to MCR 2.114 (E) which provides that upon a motion of the party, or the Court's own initiative, the Court

> ". . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay the other party or parties the amount of the reasonable expenses because of the filing of the document, including reasonable attorney fees."

Section F of that court rule provides for further sanctions against the Defendant.

22. That MCR 2.115 (B) provides that upon a motion of a party, the Court may strike from a pleading

> ". . . all or part of a pleading not drawn in conformity with these rules."

23. That this matter is currently set for Case Evaluation on February 15, 2006, with summaries being due on February 1, 2006.

24. The this is not a proper matter for the ADR hearing at this time.

25. That counsel presented a signed Stipulation to this Court to seeking an order to adjourn ADR Hearing.

26. That at the time of filing this Court has not ruled on the parties Stipulation to adjourn the ADR Hearing.

WHEREFORE, the Plaintiff requests that this Court enter an order

1. To strike the answer filed by the Defendant and to assess all costs and expenses incurred and enter Judgment against Defendant;

2. To determine that the answer filed by the Defendant was a frivolous defense and to assess costs as provided by MCR 2.625 (A)(2);

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

3. Assess costs and sanctions for filing a frivolous defense

4. Directing the Defendant to participate in arbitration of this matter pursuant to the terms of the contract between the parties;

5. To remove this case from the ADR docket;

6. To retain jurisdiction to enforce compliance and/or make any other determinations, orders and/or judgments necessary to fully adjudicate the rights of the Plaintiffs herein; and

Date: 2/1/06

John D. Nickola P 18295
Attorney For Plaintiffs

SUPPORTING AFFIDAVIT

STATE OF MICHIGAN)
)
COUNTY OF GENESEE)

JOHN D. NICKOLA, being first duly sworn, deposes and says that his is the attorney on the forgoing entitled cause of action on behalf of Plaintiffs, and I have this Motion and allege that the facts set forth in the attached motion are true and accurate to the best of his knowledge.

John D. Nickola

Subscribed and sworn to
before me on February 1, 2006

DEBRA L. STEPHENS, Notary Public
Genesee County, Michigan
Acting in Genesee County
My Commission Expires: 3/11/06

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 13

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE,

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO CORRECT OR STRIKE PLEADINGS AND POST SANCTIONS, ASSESS COSTS AND/OR FEES, REMOVE CASE FROM CASE EVALUATION DOCKET OR ADR DOCKET AND DEFENDANT'S REQUEST TO SEND THE MATTER TO ARBITRATION

The defendant MIC GENERAL INSURANCE CORPORATION d/b/a GMAC INSURANCE, through its attorneys, GARAN LUCOW MILLER, P.C., responds to the plaintiff's motion as follows:

1. Admit that the plaintiffs were injured in automobile accident on the date alleged but neither admit nor deny the level of injuries sustained.

2. Deny but further state that the plaintiffs were insured with MIC General

Insurance Corporation, part of the group of GMAC Insurance.

3. Admit.

5. Deny but further state the policy of insurance issued by MIC General Insurance Corporation did provide both uninsured and underinsured coverage in the amount of $100,000 to each person and $300,000 per accident.

6. Neither admit nor deny.

7. Admit.

8. Admit.

9. Deny but do state that the policy of insurance issued by GMAC does contain the language as alleged.

10. Deny as it concerns policy issued by GMAC but as it concerns a policy issued by MIC General Insurance Corporation admit that the plaintiffs, through their attorneys, made a demand for arbitration.

11. The response that was provided was provided on behalf of MIC General Insurance Corporation but it does contain the quoted portions as alleged.

12. Admit that the plaintiff requested a copy from the defendant MIC General Insurance Corporation for a certified copy of the policy which was produced. Further state that the uninsured motorist portion of the policy has the language indicating that both parties must agree but the underinsured motorist portion of the policy does not contain that same language.

13. Admit.

14. Admit.

15. Admit.

16. Deny on that basis that it is untrue.

17. Deny on that basis that it is untrue.

18. Deny on that basis that it is untrue.

19. Deny on that basis that it is untrue.

20. Deny on that basis that it is untrue.

21. Deny on that basis that it is untrue.

22. Admit.

23. Deny and further indicate that case evaluation has been adjourned.

24. Admit.

25. Admit.

26. At the time of responding to this motion it is understanding of the defendant that the Court has agreed to sign the Order removing it from case evaluation.

WHEREFORE, the defendant requests that this Court enter an Order of the following:

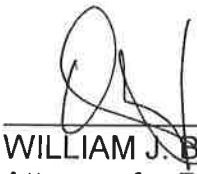
1. To deny the plaintiffs' motion for cost and attorney fees or any sanctions.

2. To dismiss the case and order the parties to arbitrate their dispute.

3. Any other relief this Court deems just and reasonable under the circumstances.

Dated February 10, 2006

GARAN LUCOW MILLER, P.C.,



WILLIAM J. BRICKLEY P-36716
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

BRIEF IN SUPPORT

Previous to this motion, plaintiffs' counsel has filed a motion for summary disposition. We indicated in response to that motion for summary disposition that we had no problem with the Court ordering the matter into arbitration but that we disagree with plaintiffs' counsel assertion that he is somehow entitled to attorney fees or costs. In fact, since almost the inception of this litigation, we have been trying to get counsel for the plaintiffs to go to arbitration but it has been his insistence that this Court somehow enter an Order for attorney fees which has prevented the matter from going to arbitration as the policy requires. (See affidavit of counsel).

The crux of the plaintiffs' argument is somehow there was a pleading improperly filed and as a result they should be entitled to sanctions under 2.114(C)(10). Plaintiff's motion though does not set forth clearly what allegations they are claiming were inaccurate. In their motion they referenced paragraph 14 of the plaintiffs' complaint and the answer. In paragraph 14 of the plaintiffs' complaint it states:

> 14. That on March 2, 2005 defendant GMAC denied plaintiffs' demand for arbitration in response stated "We do not agree to placing this matter into an arbitration form." (See attached Exhibit E)

The response to this allegation was:

> 14. In answering paragraph 14 of the complaint, defendant admits same.

In reviewing the plaintiffs' motion in paragraph 16 they state:

> "The defendant's answer, claiming that their permission must be obtained to agree to arbitration and their assertion that they did not agree to placing the matter into arbitration forum **is false**, and that such denial is not well grounded in fact, nor warranted by existing law or good faith argument for the extension, modification or reversal of existing law."

A review of the answer to the complaint does not provide any type of basis to

support this allegation. There is nothing in the answer to the complaint which in anyway claims that the plaintiff must somehow obtain permission before agreeing to arbitration. All the plaintiffs did in their allegation was restate a position taken by a representative of the defendant before the lawsuit was filed. The defendant in preparing the answer to the complaint admitted that the letter was sent and the information that was quoted was accurately quoted. Plaintiffs want to somehow read this phrase as an indication that was the defendant's official position.

The plaintiffs also cite in their motion the request for admissions. At the same time after the citing the request for admissions and the responses the plaintiffs leave it there and don't indicate whether it is claimed that any of these answers to request for admissions were inappropriate in anyway. Given the fact they were all admitted except for the one regarding summary disposition it is impossible to see how they could have any objections. Even the response on the question regarding a summary disposition was simply neither admit nor deny because the plaintiffs didn't specify under which grounds it might be entitled to summary disposition.

ARGUMENT

The only legal authority plaintiff has cited in support of his request for sanctions is MCR 2.114. This rule states in pertinent part:

> **(E) SANCTIONS FOR VIOLATION.** If a document is signed in violation of this rule, the Court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a representative party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The Court may not assess punitive damages.

The Court Rule then goes to state with the respect to the effect of a signature.

> **(D) EFFECT OF SIGNATURE** . The signature of an attorney or party whether or not the party is represented by an attorney, constitutes a certification by the signer that (1) he or she has read the documents; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

There was nothing filed in this matter which violates this rule. The only allegation of the complaint the plaintiff has pointed out was an accurate response to the allegation of the complaint. They alleged that the defendant claim representative made a certain assertion in a letter. This was admitted by the defendant. This was a truthful, well grounded response. It was the only response that would have been appropriate. If the defendant had denied the allegation that may have been a ground for sanctions. Simply admitting the content of a letter that was sent is not a ground for a sanction.

In the wherefore paragraph to the plaintiffs' motion they also suggest that the answer filed by the defendant was a frivolous defense and asked to assess costs pursuant to MCR 2.625 (A)(2). Plaintiff counsel provides no analysis or other background to support his claim that this position was somehow frivolous. The fact is the defendant simply did not assert any type of significant affirmative defenses. As is obvious from the affidavit attached of counsel at the time the answer was prepared he did not have the full and complete policy. The responses to the complaint were either admissions, or corrections of certain factual inaccuracies. The affirmative defenses listed were cautionary and conditioned upon discovery revealing evidence to support them and not once in either the responses to the allegations or the affirmative defenses did the defendant ever assert that

the plaintiffs' claims, if proper, should not go through arbitration.

What is clear in this matter is that the plaintiff did file suit but shortly thereafter it was agreed that this matter could be sent to arbitration. Defendant, through its agents, has requested the plaintiff on many times to chose an arbiter, to dismiss this litigation, and to proceed with arbitration. Plaintiff attorney has constantly refused this request. Instead counsel for the plaintiff has filed a motion which has no merit on its face and which borders on frivolous as well as a violation of MCR 2.114(E) itself. Plaintiff's allegation in paragraph 16 of their motion is just one example of the many allegations of the motion that are not grounded in any type of facts or law and have no reasonable basis.

What we would like this Court to do what we've been asking plaintiff counsel to do for many, many months. Simply send the matter to arbitration so the parties can resolve their dispute in the manner that the contract provides. No other relief would be warranted under the circumstances.

Dated February 10, 2006

GARAN LUCOW MILLER, P.C.,

WILLIAM J. BRICKLEY P-36716
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE,

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

AFFIDAVIT OF WILLIAM J. BRICKLEY

STATE OF MICHIGAN

ss.

COUNTY OF GENESEE

1. I, William J. Brickley, am the attorney involved in the defense of this matter.

2. I prepared the Answer to the Complaint.

3. At the time I prepared the Answer to the Complaint I did not have a certified copy of the policy at issue.

4. After answering the Complaint I then received a certified copy of the policy.

5. At that time I noted that the uninsured motorist provision of the policy did

indicate that arbitration was discretionary and that both sides had to give permission in order to go arbitration.

6. I also noted that the underinsured motorist portion of the policy did indicate that arbitration was mandatory upon the demand anyone party.

7. Upon review of the policy I did indicate to counsel for the plaintiff that we would be willing to have the matter go to arbitration and all we needed to do was simply choose arbiters and to stipulate to a dismissal of the litigation.

8. Counsel for the plaintiff has refused requests for either.

9. Counsel for the plaintiff has indicated that until such time as his request for attorney fees is heard that he will not agree to go to arbitration or appoint an arbiter.

10. Counsel for the plaintiff has failed to articulate to this counsel any type of reasonable basis for his request that he or his clients are entitled to any type of attorney fees, costs, or other such relief.

11. That if counsel for the plaintiff would have agreed to simply have the matter go to arbitration once it was agreed that the policy provided for it the arbitration matter most probably could have been concluded by this time.

FURTHER DEPONENT SAYETH NOT

WILLIAM J. BRICKLEY P36716
Attorney at Law

Subscribed and sworn to before
me this 13th day of February, 2006.

Kristi L. Weber, Notary Public
Genesee County, MI.
My commission expires:10-3-07

Appendix 14

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

Joseph Nickola, personal representative
of the ESTATE OF GEORGE and THELMA NICKOLA,

Plaintiff,

vs Case No. 05-81192-CK

MIC GENERAL INSURANCE CORP.,

Defendants.

_____/

PLAINTIFF'S MOTION TO STRIKE PLEADINGS AND TO ASSESS COSTS AND SANCTIONS FOR FILING A FRIVOLOUS DEFENSE

BEFORE THE HONORABLE RICHARD B. YUILLE, CIRCUIT JUDGE

FLINT, MICHIGAN - FEBRUARY 14, 2006

APPEARANCES:

For the Plaintiff: JOHN D. NICKOLA P18295
Attorney at Law
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

For the Defendant: WILLIAM J. BRICKLEY P36716
Attorney at Law
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

Recorded by: Via Video Recorder

Transcribed by: Jan Fagerman CER 7125
Certified Electronic Recorder
(810) 424-4454

TABLE OF CONTENTS

EXHIBITS:

None

WITNESSES:

None

Flint, Michigan

February 14, 2006 - 11:42 AM

(All parties present)

THE COURT: Case number 05-81192, Nickola versus MIC.

MR. NICKOLA: Ready, Your Honor. John Nickola on behalf of the plaintiff.

Your Honor, this is a motion to strike pleadings and to assess costs and sanctions for filing a frivolous defense. I need to, I believe, briefly state just a short synopsis of the history.

THE COURT: Well, let me see if I've got it and then you don't have to. This is a claim for underinsured benefits. As I understand it, under the policy, if it were uninsured, arbitration is, I guess, not mandatory. It can be stipulated to, but not mandatory. But if it's underinsured, as I understand it, maybe I'm wrong, arbitration is required. If somebody requests it, they get arbitration.

MR. NICKOLA: That's basically the provisions of the policy.

THE COURT: Right. You made a request. The adjuster said, well, both people have to agree or something to that effect and you ended up filing a lawsuit and here we are.

MR. NICKOLA: Judge, I think you have stated basically the correct statement as it relates to the terms and conditions in the policy. But it's important for this Court to understand that this was never a claim for uninsured motorist coverage. And the defendant --

THE COURT: I don't think that I said that it was.

MR. NICKOLA: No. But again I think it's important for the Court to understand that. Because as I see the brief that was filed yesterday by Mr. Brickley, he's trying to walk that tightrope here.

All of the correspondence and all of the claims and everything in this case was for underinsured motorist coverage. Everything. There was a tortfeasor that was involved. And back in the late part of October of 1994 -- or I'm sorry -- 2004, the defendant was aware that there was litigation with a tortfeasor and they had approved the resolution of taking the $20,000 from the tortfeasor for each of these plaintiffs' victims.

So, uninsured was never at issue. All of the correspondence between the plaintiffs' attorney and the plaintiffs and the defendant always related to the underinsured claim. There was a letter even back

on October 19 that they said it was okay to settle with the tortfeasor. And then on February 8, 2005, various correspondence with them talking about recognizing this is a claim for underinsured motorist coverage.

So, once that got --

THE COURT: There was a letter somewhere that said that your clients had been fully compensated and they were -- so it had to be underinsured, right? I mean --

MR. NICKOLA: That's correct, Judge.

THE COURT: -- they knew that there had been compensation?

MR. NICKOLA: Yes, sir.

THE COURT: Okay.

MR. NICKOLA: Yes, sir. Again that letter -- I can get it for you -- of February 8, I believe, where they specifically laid that out.

So, at any rate, on 2/2/2005, there's some discussion about, hey, what are you talking about as it relates to the policy? What are you talking about? I don't see it in the policy that my client has. Get us a complete certified copy of the policy. The adjuster finally sent us a complete certified copy of the policy.

Then on that basis, on February 22, 2005, we made a written demand for arbitration. That's Exhibit C to one of the pleadings that we have previously filed with the Court. I think that was Exhibit C to the brief in support of our previous motion for summary disposition. As I understand it, the Court had a policy not to accept those motions. But that letter was Exhibit C with that packet and that brief that I had previously filed with the Court for the Court's consideration.

Basically, they blew us off. They said, well, here's our policy relating to un/underinsured. Again, our claim was never an uninsured motorist coverage claim. And that letter was Exhibit D of that same document I referred to basically saying pursuant to the underinsured motorist claim in terms of my clients -- that's the letter I sent to them -- please consider a written demand for arbitration. If we don't hear from you or you don't respond to my demand in seven days. You leave me with no choice other than to file suit to enforce arbitration. If you have any questions, please do not hesitate to contact me.

A letter from them on March 1, 2005, basically saying we do not agree to placing the matter in an arbitration forum.

So, we're stuck in a position where there's a contract. The defendant doesn't play. So, we're forced to file suit.

Then we do filed suit. We file that suit on April 8, 2005. I received a letter from Mr. Brickley asking for a 30 day extension to file an answer. We agreed with that. He filed an answer on or about May 5, 2005. And then here we are.

We go on for almost eight months, nine months, in litigation before, finally, Mr. Brickley says, okay, we'll arbitrate. Yeah, we'll arbitrate but we want the costs for this litigation. He says, well, we don't want to give it to you.

Here's where we are at this point. We attempted to file a motion for summary disposition. I don't need to get into all of that I don't think. The Court may have taken it under advisement, although it's not an official filing in this Court file. Then on this basis, I made this motion to get this matter to move forward by filing a motion to strike their answer.

THE COURT: The motion was never filed. But as I read through the pleadings, Mr. Brickley didn't disagree with going to arbitration. It was just this issue of costs and sanctions that was holding this

matter up is the way I read what was going on.

MR. NICKOLA: Well, he didn't agree to that until well into August or September.

THE COURT: I understand. I'm not talking in terms of when the motion or the request to hear a summary disposition motion came in. It appeared as though there wasn't a whole lot of dispute except as to the costs and sanctions issue.

MR. NICKOLA: That's why I made the original motion for summary disposition because there was no dispute, I don't think, as to facts at that point. The Court had a policy until all discovery was done. And Mr. Brickley wanted to do some discovery in this civil litigation. I said, hey, I'm not going to have you dispose them for civil litigation and then have you redepose them again. So, we've agreed on that issue.

But, Judge, I shouldn't be here. We shouldn't be here taking up your docket and your Court time with this lawsuit. This matter should have been in arbitration from the word go. But what can you do if you're the victim and you've got the insurance company that says, basically, go fly a kite? And they were wrong. They're wrong.

So, we had no choice other than to file

litigation. Now, they come in, again, six, seven, eight months after the litigation, and say, okay, we'll arbitrate, but we want you to go away. Well, we've got a lot of work in this case, this litigation case, all because they should have done this eight months prior.

THE COURT: Do you want arbitrate?

MR. NICKOLA: Pardon me?

THE COURT: Do you want to arbitrate?

MR. NICKOLA: Yes, sir. That's what our complaint asks for. We want a declaration of rights. We want you to keep jurisdiction over this matter. That's what the contract says.

And until we finally got them to admit that in this litigation -- in this litigation, finally, they say, okay, we have to arbitrate it. But before it was --

THE COURT: Would you be entitled to say at this point in time they've breached their agreement, we'd just as soon take this to Court rather than arbitration? I don't know. I'm just asking.

MR. NICKOLA: I think it ought to go to arbitration first, Judge. That's what we said from the very beginning. It should go to arbitration first.

But this issue in terms of -- they don't want arbitrate. They said we need to get their permission, which is just wrong.

THE COURT: I haven't seen it in this context. But there are cases and I know I've had it in the consumer protection area, where there are arbitration agreements and if the defendant or the plaintiff proceed to litigation and don't acknowledge or accept it, they are deemed to have waived it. So, that's all.

MR. NICKOLA: Well, we asked, in the alternative, either for the Court to order it into arbitration -- that's what we asked for in the complaint. Asked the Court to issue an order declaring the legal rights and relationships and issue an order directing defendant GMAC to arbitrate the matter under the terms of the contract, to enter judgment on behalf of the plaintiffs of $80,000, together with costs and interest, to enter judgment on behalf of the other plaintiff in the same amount, and for you to retain jurisdiction to enforce my claims.

But again if you look at the contract, it requires arbitration. They said we need their permission, they were wrong and here we are.

We have our filing fees, our cost of

service, the various pleadings that have been filed in this case, and they're all unnecessary.

THE COURT: Thank you.

Mr. Brickley?

MR. BRICKLEY: As I understand the motion, it is one seeking sanctions under 2.114 indicating that there was a frivolous or unfounded answer filed in this case. That is what the motion is. And there wasn't.

The answer that I filed on behalf of my client didn't assert in any way whatsoever that this matter was not (inaudible) going to arbitration. It didn't assert that provision of the uninsured motorist provision of the policy. It was a very vague answer. As the affidavit I submitted indicates, I didn't have a copy of the policy at the time when the answer was filed.

When I got it, Mr. Nickola called me and says, hey, I want to file a motion. I said you don't need to file a motion. Let's go to arbitration. He would not. Ever since that point in time, he's refused to submit the matter to arbitration because of his feeling that somehow he's entitled to attorney fees.

The court rules and the laws of the State of

Michigan are very clear. A party is entitled to attorney fees only when it's authorized by statute or court rule. The only court rule that he has cited is MCR 2.114(E). And there has been no violation of MCR 2.114(E).

It's obvious what Mr. Nickola is doing. He disagreed with the adjuster's interpretation of the policy and he thinks he should somehow be entitled to attorney fees because he was right and the adjuster was wrong. But that's not the law of the State of Michigan.

THE COURT: When you filed your answer -- and I haven't gone through it paragraph by paragraph -- did you admit in your answer that Mr. Nickola's clients were entitled to arbitration under the policy?

MR. BRICKLEY: I neither admitted nor denied it, Your Honor, because I had not had a chance to review the policy at the time I filed the answer.

THE COURT: Well, when you sign your pleadings, what do you say?

MR. BRICKLEY: I say that I've made a good faith effort to investigate the matter and that based upon the information that was available to me that is a proper response.

THE COURT: All right.

MR. BRICKLEY: In fact, (inaudible) call because I didn't -- the adjuster didn't send me the policy. Mr. Nickola had it. I said, John, why don't you send me the policy? I'll take a look at it. I didn't have it at the time that the extension that Mr. Nickola gave our office expired.

THE COURT: Did you ever amend your answer?

MR. BRICKLEY: No. I did not. When he filed -- like I said, Judge, when he filed his motion -- or called me to file his motion for summary disposition, which was, what, back last October, August, or something --

THE COURT: You'll get a final chance, Mr. Nickola, but you're not going to interrupt.

MR. NICKOLA: No. I don't want to interrupt him. I thought maybe we would crystalize the issue for the Court if I could just discuss the matter with Mr. Brickley for just a second? I think we can save the Court sometime.

THE COURT: If you want to resolve this, I'm thrilled.

(Discussion between counsel; inaudible)

MR. BRICKLEY: He says it's not sanctions against me, Your Honor. So, I don't know that there would be any --

MR. NICKOLA: That's why I stood up, Your Honor, to talk to Mr. Brickley. Mr. Brickley, what he's saying, I think is a correct statement. He filed an answer. The court rules require more. The court rules require sanctions against the defendant or the defendant's attorney.

In this case, there was ample time for the defendant to get its act together beforehand. Mr. Brickley asked for an extension, 30 days. We gave it to him.

But even after the extension, the defendant dillydallied. The defendant MIC Insurance Company dillydallied. It leaves him in an untenable position of I've got to file an answer or a default is going to be taken and he still doesn't have the information. So, he does what, I guess, he feels he needs to do.

But it's the defendant in this case.

THE COURT: Well, the court rule talks about the person who signs.

MR. BRICKLEY: That's correct, Your Honor. Sometimes people win cases and sometimes people lose cases, Your Honor. Maybe the position you took before you filed the suit is found to be accurate and maybe there was a misunderstanding. But the court rules and the statutes don't allow attorney fees for those.

I mean, that's the rules that we have. That's the American rule that we have adopted. We don't have the English rule where the winner gets attorney fees.

THE COURT: But you would agree that your adjuster was dead wrong in terms of his interpretation of the policy?

MR. BRICKLEY: Yeah. After I got the policy, we talked about it. I had full authority to submit this matter to arbitration.

THE COURT: In terms of recovering his costs of filing suit, he doesn't get those even though they were precipitated by a refusal of your client to abide by the terms of the policy?

MR. BRICKLEY: I suppose it depends upon how the Court resolves it. I haven't seen a listing of costs. So, I don't know what costs he's asking for.

The only request really that he's been talking to me about is attorney fees. But I don't know what kind of costs he's asking to be reimbursed.

I mean, I would hope I wouldn't have to pay for the cost of this motion because I've been asking to dismiss this thing for I don't know how long. But he sees -- if I see a list of costs, I'll take a look at it and let you know if I have any objections. But

I haven't seen any as of now.

I don't know what disposition this Court is going to make of the matter either, as to whether or not there would be some sort of court rule or statute which would allow costs in that circumstance as well.

THE COURT: All right. I won't interrupt you again. You can conclude.

MR. BRICKLEY: I'm done, Your Honor. I don't have anything else to say.

THE COURT: Mr. Nickola, anything further?

MR. NICKOLA: No. I think the Court understands the issues.

Again, I just want to make certain that even though the defendant was dilatory, the attorney has to do what he's got to do. Under the facts and circumstances, the Court may assess costs against the defendant, a party, or the attorney.

THE COURT: Have you submitted requested costs?

MR. NICKOLA: It's not been an issue up until this point, Your Honor. The answer to the question is no, because, again, it's not been an issue.

I can do that. But they've been adamant, no, we're not going to pay any costs. If the Court wants us to --

THE COURT: I want you to submit what you believe you're entitled to --

MR. NICKOLA: Thank you, sir.

THE COURT: -- with a copy to Mr. Brickley.

MR. BRICKLEY: (Inaudible) I say that the Court is denying his motion for attorney fees?

THE COURT: Not yet.

MR. BRICKLEY: So, you're taking it under advisement, is that the --

THE COURT: Well, I need to look at, at some point in time, you agreed to go to arbitration, what happened in the period of time before that and how much time elapsed.

MR. BRICKLEY: Okay.

MR. NICKOLA: Thank you, Your Honor.

MR. BRICKLEY: So, are we supposed to come back at a certain point in time?

THE COURT: I hope not. I'm not going to ask you to come back.

MR. BRICKLEY: Okay.

THE COURT: I just want to see his time frame in terms of his costs and expenses.

MR. BRICKLEY: Okay.

MR. NICKOLA: We'll crystallize those facts and issues for you, Your Honor. Thank you.

MR. BRICKLEY: Thank you.

THE COURT: If you want to send it to arbitration -- if you want to do an order sending it to arbitration and leaving this part with me, go ahead and do it. Then you won't hold up on that.

MR. NICKOLA: Thank you, Judge.

MR. BRICKLEY: Thank you.

(At 11:59 AM, proceedings concluded)

Tape No. 02/14/06 11:59 AM

STATE OF MICHIGAN)

COUNTY OF GENESEE)

I, Jan Fagerman, do hereby certify that this transcript, consisting of 19 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on February 14, 2006, before the Honorable Richard B. Yuille, Circuit Judge.

October 10, 2014

JAN FAGERMAN CER 7125
Circuit Courthouse
900 S. Saginaw Street
Flint, Michigan 48502
(810) 424-4454

Appendix 15

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,
Plaintiffs,

FILED

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL,
Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, MI 48439
(810) 695-3700

ORDER

At a session of said Court held in the Courthouse in the City of Flint, State of Michigan on the ___ day of _____, 2006

PRESENT: HONORABLE RICHARD B. YUILLE, Circuit Court Judge

WHEREAS this matter having come before this Court on a Motion of the Plaintiff for Attorney Fees, to Strike Defendant's Answer, Impose Sanctions and other relief; and

WHEREAS the Court being fully advised in the premises.

IT IS HEREBY ORDERED:

1. That Plaintiff shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees;

2. That this case is ordered into Arbitration, and;

3. That this Court retains jurisdiction to enforce compliance and/or make any other determination, orders and/or judgments necessary to fully adjudicate the rights of the ~~Plaintiffs herein.~~ parties herein.

Date: 3/6/2006

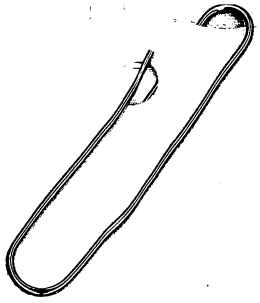
Richard B. Yuille, Circuit Court Judge

W. J. Brickley approved as to form

Appendix 16

GARAN LUCOW MILLER P.C.

8332 OFFICE PARK DRIVE
GRAND BLANC, MI 48439-2035
TELEPHONE: 810.695.3700
FAX: 810.695.6488



William J. Brickley
E-Mail: wbrickley@garanlucow.com

May 12, 2006

John D. Nickola
Attorney at Law
1015 Church Street
Flint, Michigan 48502

RE: Nickola & Nickola v MIC
Our File No: 993-768

Dear Mr. Nickola:

I did receive your letter of May 9, 2006 and thank you for the same. Mr. George Steel will be acting as our arbiter in this matter. By copy of this letter I am asking Mr. Steel and Mr. Hanflik to collaborate on picking a third person to act as the neutral arbiter. They then can take the steps necessary to arrange a hearing date.

I thank you for your cooperation.

Very truly yours,

WILLIAM J. BRICKLEY
For the Firm

WJB/kw
cc: Henry M. Hanflik, Esq.
George W. Steel, Esq.

Appendix 17

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MARK PHILLIPS (P63063)
MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

MOTION TO:
1. ASSESS COSTS, ATTORNEY FEES AND SANCTIONS;
2. TO ASSESS INTEREST;
3. TO ENTER JUDGEMENT ON THE COSTS AND/OR SANCTIONS, ARBITRATORS AWARD, AND INTEREST

NOW COMES the Plaintiff, Joseph Nickola, in his representative capacity as Personal Representative of the Estates of both George Nickola and Thelma Nickola, his decedents, and says as follows:

1. That Plaintiffs were injured on April 13, 2004 and this civil action was filed on April 8, 2005; the parties agreed on March 6, 2006, that in lieu of trial, the matter would be submitted to

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binding statutory arbitration and the Court, while retaining jurisdiction, did order the mater to arbitration and the Arbitrators did enter an award on October 2, 2013.

2. That Plaintiffs are entitled to costs, attorney fees, sanctions and interest in addition to the arbitration award.

3. That the Defendant MIC General Insurance, d/b/a GMAC Insurance (hereinafter MIC), insured George and Thelma Nickola, who were insureds of the Defendant and the Plaintiffs were directly **entitled to underinsured motorist benefits** by virtue of an automobile insurance policy, said policy providing **underinsured motorist coverage** in the amount of One Hundred Thousand Dollars ($100,000.00) per person and Three Hundred Thousand Dollars ($300,000.00) each accident, said policy being in effect on or about April 13, 2004.

4. That on or about April 13, 2004, the Plaintiffs were involved in a serious motor vehicle crash with a primary tortfeasor driver and sustained serious bodily injuries.

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5. That the Defendant MIC, pursuant to the above described policy **also provided Michigan Personal Protection Insurance**, a/k/a PIP, to the Plaintiffs, who were directly entitled to such benefits, which included but was not limited to medical expenses, attendant care, and replacement services.

6. That on or about May 7, 2004, Plaintiffs, through their attorney, did file a claim for **under**insured motorist coverage with the Defendant MIC. (See **Attached Exhibit A**)

7. That on or about July 8, 2004, the Defendant was informed by the Plaintiffs' attorney that he was retained on behalf of the Plaintiffs, and the Defendant MIC asked for a summary of the injuries sustained by Plaintiffs, George and Thelma Nickola respectively, which the Plaintiffs did, on July 9, 2004, in writing, submit that summary to MIC as requested. (See **Attached Exhibit B**)

8. That the Defendant **MIC/Gregory Edwards** (the adjuster),

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requested from the Plaintiffs, permission to review MIC's No-Fault records concerning George and Thelma Nickola and on July 27, 2004, the Plaintiffs, in writing, gave MIC/Mr. Edwards the requested permission in writing. (See **Attached Exhibit C**)

9. That in the said Exhibit C, other information was requested by MIC and MIC was informed that the primary tortfeasor's company would be tendering the full amount of their liability coverage, i.e. $20,000.00/$40,000.00 and that the Plaintiffs requested permission from Defendant MIC to accept that coverage and **settle with the tortfeasor**.

10. That the primary tortfeasor did, on or about September 7, 2004, **offer** the full amount of liability coverage to the Plaintiffs (said amount being $20,000.00 per person).

11. That on September 14, 2004, the Plaintiff **duly informed** the Defendant MIC of the proposed settlement, and forwarded a copy of the primary tortfeasor's insurance company's offer for their review and requested MIC's permission to accept the

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tortfeasor's offer.

12. That on September 14, 2004, the Plaintiffs further indicated that the Defendant MIC **had all of the medical records for the respective** Thelma Nickola and George Nickola's injuries, and that Plaintiffs' attorney **requested the full remaining $80,000 for each Plaintiff for underinsured motorist limits that were available** pursuant to their claim for underinsured motorist coverage and further requested that if there was **additional information** needed before making full payment, to **please advise immediately**. (See **Attached Exhibit D**, with offer to settle)

13. That the Defendant insurer, MIC, **never specified in writing**, (or otherwise) pursuant to MCL 500.2006 (1) - (4), what it claimed constituted a satisfactory proof of loss within 60 days after they received the Plaintiffs' claim, that date being May 7, 2005 (see paragraph #6 herein)

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14. That on or about October 14, 2004, the Defendant granted their permission to Plaintiffs to accept the primary tortfeasor's offer to settle. (See **Attached Exhibit E**)

15. That on or about October 19, 2004, the Defendant sent further correspondence to Plaintiffs' counsel again granting to Plaintiffs permission to settle with the tortfeasor and requested a copy of the releases. (See **Attached Exhibit F**)

16. That on February 8, 2005, the Plaintiffs forwarded copies of the releases to Defendant MIC/Mr. Edwards and after settling with the primary tortfeasor with MIC's permission, Plaintiff **renewed** their **claims** for underinsured motorist benefits for $80,000 each Plaintiff, and again referenced MIC's ample opportunity to review the medical records of Plaintiffs George and Thelma Nickola, already possessed by the Defendant, which clearly demonstrated their substantial injuries and **again requested payment** of the full remaining underinsured limits available of $80,000.00 each to George and Thelma Nickola,

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pursuant to their direct claims against the Defendant MIC pursuant to their underinsured motorist coverage in their automobile insurance policy. (See **Attached Exhibit G**)

17. That on or about February 17, 2005, the Defendant/Mr. Edwards summarily responded by denying the Plaintiffs' claims for **underinsured motorist coverage** under Plaintiffs' contract of insurance further claiming MIC's investigation had revealed that the Plaintiffs were adequately compensated by the primary tortfeasor upon payment of the $20,000.00 to each Plaintiff, totaling $40,000.00, further indicating that MIC believed that Plaintiffs were adequately compensated for their pre-existing injuries which were aggravated by the accident, claiming if there was additional information to please forward the medical records and he (Mr. Edwards) would be happy to review the matter again. (Please recall MIC had all of Plaintiffs' medical records for their review) (See **Attached Exhibit H**, and paragraphs 8 & 12 herein)

18. That on February 22, 2005, the Plaintiffs, pursuant to their MIC

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policy, filed a written demand for arbitration with the Defendant. (See **Attached Exhibit I**)

19. That the Defendant MIC acknowledged receipt of Plaintiff's Febraury 22, 2005 written demand for arbitration, but on March 1, 2005, **denied Plaintiff's arbitration demand falsely claiming** that the policy terms required "both we and the insured must agree to arbitration" and MIC refused to agree to arbitration. (See **Attached Exhibit J**)

20. That in response to Plaintiffs' earlier request, for a certified copy of the policy, the said Defendant/Mr. Edwards, on or about March 22, 2005, sent a certified copy of the Plaintiffs applicable auto liability policy to the Plaintiff (See **Attached Exhibit K**, certification and cover letter)

21. That the Plaintiffs were forced to file suit to get the underinsured benefits that they paid for and that suit was filed in the instant matter on April 8, 2005, praying for money

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damages in the amount of $80,000.00 on behalf of George Nickola and Thelma Nickola respectively, and asking the Court to retain jurisdiction to make other orders. (*See Complaint in Court file*)

22. That the Defendant's then Attorney, William Brickley, in response to Plaintiffs Complaint, filed a notice of retention on April 22, 2005.

23. That the Defendant MIC and their Attorney, on May 20, 2005, filed an **unfounded answer** to Plaintiffs' complaint and:

(1) **Falsely claimed** that the Plaintiff did not have the right to demand arbitration **without MIC's agreement**.

(2) **Falsely claimed** that the Plaintiffs inclusion of Exhibit C of the Complaint, the underinsured motorist provision, **was not the proper portion of the policy**, **when it was in fact extracted** from a **copy of the policy** which was **certified** on **March 4, 2005** by MIC and **delivered to the Plaintiffs** on or about **March 22, 2005**, said

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certification stating that the copy of the policy is:

> . . .a true and exact reproduction of the declarations showing coverages carried by the above named insured as of April 13, 2004. . .

(*See paragraph 12 of the Complaint and Answer in Court file, and paragraph 20 of this motion along with Exhibits J and K herein*).

(3) Admitted that Plaintiffs filed a written demand for arbitration (*See paragraph 13 of the Complaint and Answer in Court file*) but that Defendant MIC **denied Plaintiffs' arbitration demand and stated "we [Defendant MIC] do not agree** to placing this matter in an **arbitration forum**." [emphasis added] (*See paragraph 14 of the Complaint and Answer in Court file*, and **Attached Exhibit J**, herein)

24. That the Defendant admitted that the Plaintiffs were insured by the Defendant MIC, said policy providing coverage for underinsured motorist coverage for the protection of the Plaintiffs George and Thelma Nickola and that the policy

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provided $100,000.00 per person; $300,000.00 per accident on behalf of George and Thelma Nickola. (*See paragraph 9 of the Complaint and Answer in Court file*)

25. That in response to the Plaintiffs claim for damages **in the instant lawsuit**, the Defendant MIC claimed, amongst other things, that:

A. It would assert said comparative negligence as a bar or set-off to the amounts that Plaintiffs may be entitled to receive.

B. If either Plaintiff failed to mitigate their damages, MIC would seek a dismissal or reduction of their claim for damages.

C. Michigan requires either Plaintiff to sustain a threshold injury and to the extent that either Plaintiff has not sustained a threshold injury, they would seek a bar or dismissal of Plaintiffs's claim for damages.

D. Defendant demanded a trial by Jury.

(*See Answer in Court file*)

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26. That thereafter, the Defendants, **pursuant to the underlying litigation**, **demanded considerable amounts of discovery**, and **requested** that the **Plaintiffs sign authorizations entitling** the **Defendant MIC** to **obtain a great multitude of medical records of the Plaintiffs** so that the Defendants would be able to **defend against Plaintiffs' request for money damages** in the **instant lawsuit**.

27. That on August 4, 2005, the Plaintiffs, pursuant to the underlying litigation filed Requests for Admissions of the Defendant. (See **Attached Exhibit L**)

28. That on September 19, 2005 the Defendants filed their **response** to Plaintiffs' **requests for admissions**, and admitted:

A. That the policy that the Plaintiffs had previously referenced (*See Exhibits A and C to the Complaint in Court file)*, was a true copy. (See **Attached Exhibit L**, paragraph 1)

B. That there was an endorsement for underinsured motorist

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coverage. (See **Attached Exhibit L**, paragraph 2)

C. That the underinsured motorist coverage claimed by the Plaintiffs provided that if the insurance company MIC did not agree that

1. The Plaintiffs are entitled to recover underinsured motorist benefits; or

2. As to the amount, **then either party may demand** arbitration.

[emphasis added] (See **Attached Exhibit L**, paragraph 4)

29. That even after that, the Defendant proceeded with more discovery in the instant lawsuit, whereupon Plaintiffs filed a motion on February 1, 2006 to **correct and/or strike pleadings, impose sanctions, assess costs and/or fees and/or remove the case from the ADR docket**.

30. That Plaintiffs' **above motion** was scheduled for hearing on March 6, 2006, and ultimately, prior to a hearing on the matter,

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the parties stipulated and this Court ordered:

1. That the Plaintiffs shall supply to the Court and to counsel for the Defendant, his list of costs and expenses as well as attorney fees;

2. That this **case is ordered into arbitration**;

3. That the court retains jurisdiction to enforce compliance or make other determinations, orders and/or judgments, necessary to fully adjudicate the rights of the parties herein.

[emphasis added] (See **Attached Exhibit M**)

31. Accordingly, the Plaintiffs, on May 9, 2006 named arbitrator Henry Hanflik and shortly thereafter on May 12, 2006 the Defendant named arbitrator George Steel, with the understanding that those two arbitrators would use their efforts to try to collaborate in picking a third person to act as a neutral arbitrator.

32. That thereafter, the said two arbitrators had a number of discussions and failed attempts, but that the two arbitrators

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were never able to agree to a third arbitrator.

33. That while awaiting arbitration, the said Thelma Nickola did become seriously ill, and was diagnosed with lung cancer, in October 2007, and did die as a result thereof on January 24, 2008.

34. That Plaintiffs duly informed the Defendant MIC and proceeded to have Joseph Nickola appointed as Personal Representative of the Estate of Thelma Nickola.

35. That during the course of waiting for progress in this statutory arbitration matter, as well as other matters, the said George Nickola, because of his injuries, was unable to continue to live in his home in Gladwin County, Michigan and even though he kept his home, he did take an apartment in Genesee County, where he could be closer to his children.

36. That on or about October 13, 2011, as a result of the instability and/or difficulties with his balance and ability to walk, he did

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suffer a fall down a flight of stairs in Genesee County and did suffer serious and disabling injuries including a serious brain injury, wherein he almost died and required a long period of hospitalization and extended care.

37. That the said George Nickola did recover sufficiently to be discharged from the hospital, into an extended care facility and he ultimately, on or about January 28, 2012, went to stay with his son Joseph Nickola, and his family, in Grand Blanc, Michigan.

38. That the said George Nickola did continue to suffer from his injuries, which included, but was not limited to, unsteadiness on his feet and difficulty walking, and while at the home of his son, he did again fall on a driveway, sustaining additional damages to his head and brain, which required emergency surgery, from which the said George Nickola did not recover and he did die on April 14, 2012.

39. That on or about May 30, 2012, the Defendant changed its

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

attorneys and the firm of Peseski and Associates filed a substitution of counsel for William Brickley. (*See Court file*)

40. That on July 13, 2012, Joseph Nickola was substituted in the underlying litigation as the proper party in a representative capacity on behalf of the Estates of both Thelma Nickola and George Nickola, respectively

41. That the said arbitrators nominated by the respective parties herein, i.e. Mr. Hanflik and Mr. Steel, still did not and/or were unable to agree as to a third neutral arbitrator, wherein the Plaintiffs filed a motion on August 3, 2012 requesting that this **Court appoint a third neutral arbitrator** and the Defendant did agree.

42. That on August 13, 2012, this Honorable Court did appoint Donald Rockwell, Esq. as the neutral arbitrator.

43. That the Defendant MIC then contacted Plaintiff and requested permission to change its nominated Arbitrator, which Plaintiff

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

agreed to, and that thereafter, the Defendant MIC substituted Charles Filipiak in lieu of George Steel.

44. That after a number of attempts at scheduling procedures and addressing facts and issues, the matter was ultimately scheduled for an arbitration hearing on October 2, 2013 at which time the arbitrators did render an award which included a monetary award in the amount of $80,000.00 for George Nickola and $33,000.00 for Thelma Nickola respectively, which included **interest as an element of damages from the date of the injury (April 13, 2004) until suit was filed on April 8, 2005, reserving for this Court the duty to determine interest on the amount of the award, costs, sanctions, and attorney fees, and interest on those amounts from the day suit was filed until the judgment is fully paid**. (See **Attached Exhibit N**, Arbitration Award)

45. Prior to filing this motion, the attorney for Plaintiff contacted the Defendant in an attempt to reach an agreement as to the amount of the judgement to be entered in this matter, which

would include the arbitrators' award together with costs, interest, attorney fees and sanctions, but was unable to obtain concurrence. (See **Attached Exhibit O**, October 9, 2013 correspondence to Mr. Phillips).

WHEREFORE, Plaintiffs request that this Court enter an order assessing attorney fees and/or costs and/or sanctions against the Defendant for the frivolous defenses, for the time Plaintiff has spent on this matter and/or to schedule a date and time for a hearing thereon;

FURTHER Plaintiffs request that this Court will enter Judgment based on the arbitration award and to include costs, attorney fees, and all applicable interest thereon, until fully paid;

FURTHER, Plaintiffs request that this Court will enter an order consistent with MCL 500.2006(1) - (4) assessing interest at the rate of 12% simple interest from the date of September 13, 2004 up through and including the date of this hearing on this matter, said interest to continue until the judgment is fully paid.

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

FURTHER Plaintiffs request that this Court grant such other relief as equitable and necessary.

Date: 11/25/13

John D. Nickola (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 18

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, CONSERVATOR OF
THE ESTATE OF GEORGE NICKOLA
A Protected Person; and JOSEPH G. NICKOLA
PERSONAL REPRESENTATIVE OF THE
ESTATE OF THELMA J. NICKOLA, DECEASED **Case No: 05-81192-NI**

Plaintiffs, **Judge: RICHARD B. YUILLE**

v

MIC GENERAL

Defendant.

_____/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420/810-767-4719 (fax)

WILLIAM J. BRICKLEY P36716
GARAN LUCOW MILLER
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, MI 48439
810-695-3700
810-695-6488

_____/

STATEMENT OF FACT OF DEATH OF PLAINTIFF GEORGE NICKOLA

NOW COMES the undersigned attorney for the Plaintiffs herein and files this notice and statement of fact of the death of George Nickola, a party herein, who died on April 14, 2012.

Date: 5/11/12

JOHN D. NICKOLA P18295
ATTORNEY FOR PLAINTIFFS

Appendix 19

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, CONSERVATOR OF
THE ESTATE OF GEORGE NICKOLA
A Protected Person; and JOSEPH G. NICKOLA
PERSONAL REPRESENTATIVE OF THE
ESTATE OF THELMA J. NICKOLA, DECEASED
THELMA NICKOLA

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

_____/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

_____/

NOTICE OF SUBSTITUTION OF PARTIES

NOW COMES Joseph Nickola, Conservator of the Estate of George Nickola, by his attorney and states as follows:

1. That on March 16, 2012, Joseph G. Nickola was appointed, by the Genesee County Probate Court, as Personal Representative of the Estate of George Nickola.

2. That on April 14, 2012, George Nickola died and that a notice of death has previously been served on the Defendant May 11, 2012.

3. That on June 8, 2012, Joseph Nickola was appointed as the Personal Representative of the Estate of George Nickola, Deceased. (See attached Letters of Authority)

4. That Plaintiff hereby substitutes Joseph G. Nickola, Personal Representative of the Estate of George Nickola, Deceased in place of Plaintiff Joseph Nickola, Conservator of the Estate of George Nickola.

Date: 6/13/12

John D. Nickola P18295
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Approved, SCAO

STATE OF MICHIGAN PROBATE COURT COUNTY OF GENESEE	LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE	20121937720E

Estate of George Nickola, Deceased

TO:

Name and address	Telephone no.
Joseph George Nickola 5095 Rockwood Dr. Grand Blanc, MI 48439	(810) 275-4238

You have been appointed and qualified as personal representative of the estate on 6-8-12 (Date). You are authorized to perform all acts authorized by law unless exceptions are specified below.

☐ Your authority is limited in the following way:

☐ You have no authority over the estate's real estate or ownership interests in a business entity that you identified on your acceptance of appointment.

☐ Other restrictions or limitations are:

☐ These letters expire: N/A (Date).

6-8-12
Date

Susan L. Jeffs
Judge (formal proceedings)/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE

Habeeb Ghattas P27972
Attorney name (type or print) Bar no.

226 W. Court St.
Address

Flint, MI 48502 (810) 238-1331
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original, and on this date, these letters are in full force and effect.

6-8-12
Date

Deputy register

Do not write below this line - For court use only

FILED
2012 JUN -8 A 8:38
PROBATE COURT
GENESEE COUNTY
REGISTER

PC 572 (10/07) LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MCL 700.3601, MCR 5.202, MCR 5.206, MCR 5.307, MCR 5.310

Appendix 20

Approved, SCAO

Original - Court file
1st copy - Assignment Clerk/Extra
2nd copy - Friend of the Court/Extra
3rd copy - Opposing party
4th copy - Moving party

STATE OF MICHIGAN 7th JUDICIAL CIRCUIT JUDICIAL DISTRICT COUNTY	REQUEST FOR HEARING ON A MOTION	CASE NO. 05-81192-NI (YUILLE)

Court address: 900 S. SAGINAW STREET, FLINT, MI 48502

Court telephone no.: 810-257-3220

Plaintiff name(s) George Nickola PR Estates of George & Thelma Nickol		Defendant name(s) MIC GENERAL
Plaintiff's attorney, bar no., address, and telephone no. JOHN D. NICKOLA (P18295) 1015 CHURCH STREET FLINT, MI 48502 810-767-5420	v	Defendant's attorney, bar no., address, and telephone no. MICHAEL J. PESESKI (P43972) 1111 W. LONG LAKE ROAD, SUITE 103 TROY, MI 48098 336-435-8601

1. Motion title: PLAINTIFFS' MOTION FOR THE COURT TO APPOINT ARBITRATOR PURSUANT TO MCL600.5015

2. Moving party: PLAINTIFFS

3. Please place the following on the motion calendar for:

Judge RICHARD B. YUILLE (P22664)	Bar no.	Date 8/13/12 or as soon thereafter as determined by the Court.	Time 1:30 p.m.
Hearing location ☒ Court address above ☐			

☒ 4. I certify that I have made personal contact with attempted contact with Michael Peseski on July 30 and Aug 2, 2012 regarding concurrence in the relief sought in this motion and that concurrence has been denied or that I have made reasonable and diligent attempts to contact counsel requesting concurrence with this motion.

August 3, 2012
Date

Attorney John D. Nickola P18295
Bar no.

5. ☐ DOMESTIC RELATIONS MOTIONS ONLY
a. A recommendation from the Friend of the Court ☐ is ☐ is not requested.
b. All necessary information ☐ has ☐ has not been submitted to the Friend of the Court.

6. Clerk's record of decision: ☐ Granted ☐ Denied ☐ Not heard _____ Date _____ Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

PLAINTIFFS' MOTION FOR THE COURT TO APPOINT AN ARBITRATOR PURSUANT TO MCL 600.5015

NOW COMES the Plaintiff by his attorney and for his motion for the court to appoint an arbitrator, pursuant to **MCL 600.5015** states as follows:

1. That Plaintiffs filed suit on April 8, 2005 seeking damages and other relief from the Defendant.

2. That thereafter, the parties, by their counsel, agreed that the matter be ordered into arbitration and the Court, on March 6, 2006, signed the said order.

3. That the Court retained jurisdiction to enforce compliance and to make any other determination, orders, and/or judgments necessary to fully adjudicate

the rights of the parties herein (statutory arbitration).

4. That the parties herein subsequently agreed to submit the decisions herein to three arbitrators pursuant to Michigan law, and the Court would retain jurisdiction to enforce compliance and/or make any other determinations, orders, and/or judgments necessary to fully adjudicate the rights of the parties herein.

5. That thereafter, the parties named an arbitrator, Plaintiffs - Henry Hanflik, and the Defendant - George Steel, to act as arbitrators.

6. That thereafter, the Plaintiffs, Thelma Nickola and George Nickola became ill and each of them ultimately passed away, although at different times, and their son, Joseph Nickola, was named as Personal Representative of the estate of each and substituted as party for the original Plaintiffs.

7. That thereafter, Mr. Hanflik and Mr. Steel were unable to agree as to a 3rd arbitrator and counsel for the respective parties were also unable to agree.

WHEREFORE, Plaintiff prays that this Court shall, pursuant to MCL 600.5015, appoint an arbitrators herein.

Date: 8/3/12

John D. Nickola (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 21

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

ORDER APPOINTING AN ARBITRATOR PURSUANT TO MCL 600.5015

At a session of said Court held in the Courthouse
in the City of Flint, State of Michigan on the
_____ day of _____, 2012

PRESENT: HONORABLE RICHARD B. YUILLE, Circuit Court Judge

WHEREAS this mater having come before the Court on Plaintiffs' motion to appoint an arbitrator;

IT IS HEREBY ORDERED that the following person is appointed as arbitrator in this matter:

DON ROCKWELL

Honorable Richard B. Yuille
Circuit Court Judge

Date: 8/13/12

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 22

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE
OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and
JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE
OF THE ESTATE O THELMA J. NICKOLA, DECEASED

Plaintiffs/Claimants,

Case File No. 05-81192-NI
Hon. Richard B. Yuille

vs.

MIC GENERAL

Defendant/Respondent

ARBITRATORS
Donald G. Rockwell
Henry M. Hanflik
Charles F. Filipiak

JOHN D.NICKOLA (P18295)
Nickola and Nickola
1015 Church Street
Flint, Michigan 48502
810.767.5420
Attorney for Plaintiffs/Claimants

MARK E. PHILLIPS (P63063)
Pesecki and Associates
1111 West Long Lake Road, Suite 103
Troy, Michigan 48098
336.435.8608 (Direct)
Attorney for Defendant/Respondent

ARBITRATION AWARD

After the parties, through their respective attorneys, have submitted evidence, summaries and arguments, and the arbitration panel having duly deliberated, the following is the award of the arbitration panel:

$ Eighty Thousand (80,000.00)* to Joseph G. Nickola, Personal Respresentative of the Estate of George Nickola, Deceased, inclusive of interest, if any, as an element of damage from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court.

$ Thirty Three Thousand (33,000.00)* to Joseph G. Nickola, Personal Respresentative of the Estate of Thelma J. Nickola, Deceased, inclusive of interest, if any, as an element of damage from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court.

*In addition to any amounts previously paid.

FEES OF ARBITRATORS

The arbitrator fees shall be as follows:

Plaintiffs/Claimants shall be responsible for the fees of Arbitrator Henry M. Hanflik, and the Defendant/Respondent shall be responsible for the fees of Arbitrator Charles F. Filipiak. Plaintiffs/Claimants and Defendant/Respondent shall each be responsible for one-half the fees of Arbitrator Donald G. Rockwell which in total is $Two Thousand Eight Hundred ($2,800.00)

Dated the 2nd day of October, 2013.

Henry M. Hanflik, Arbitrator

Charles F. Filipiak, Arbitrator

Dissent as to the Estate of George Nickola

Donald G. Rockwell, Arbitrator

Appendix 23

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

Joseph Nickola, personal representative
of the ESTATE OF GEORGE and THELMA NICKOLA,

Plaintiff,

vs Case No. 05-81192-CK

MIC GENERAL INSURANCE CORP.,

Defendants.

_____/

MOTION HEARING

BEFORE THE HONORABLE RICHARD B. YUILLE, CIRCUIT JUDGE

FLINT, MICHIGAN - MONDAY, DECEMBER 9, 2013

APPEARANCES:

For the Plaintiff: JOHN D. NICKOLA P18295
Attorney at Law
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

For the Defendant: MICHAEL J. PESESKI P43972
Attorney at Law
5445 Corporate Drive, Suite 360
Troy, Michigan 48098
(248) 822-6461

Recorded by: Via Video Recorder

Transcribed by: Jan Fagerman CER 7125
Certified Electronic Recorder
(810) 424-4454

TABLE OF CONTENTS

EXHIBITS:

None

WITNESSES:

None

Flint, Michigan

Monday, December 9, 2013 - 10:11 AM

(All parties present)

THE COURT: Case number 05-81192, Nickola versus MIC General.

MR. NICKOLA: Ready, Your Honor.

THE COURT: Who are these other gentlemen here? Are they with you folks?

UNIDENTIFIED VOICE: Probation, sir.

THE COURT: For 10:30?

UNIDENTIFIED VOICE: Yes, sir.

THE COURT: Okay. Very prompt.

MR. PHILLIPS: Good morning. Mark Phillips appearing on behalf of (inaudible - papers being shuffled at podium).

THE COURT: Good morning.

MR. NICKOLA: John Nickola on behalf of the plaintiffs, Your Honor.

Your Honor, I think the motion fairly well states the facts in this particular case. Maybe just to summarize --

THE COURT: I read it. I have one question. That is are the penalties or the costs that you're seeking awarded regardless of whether there was a legitimate good faith defense to the claim?

I'll tell you what my concern is. If they're automatic, that's fine. I mean, if the fact that it took eight years to get payment is sufficient to determine that these costs are applicable, that's one thing. But if it's a fact question, whether the payments were a good faith refusal or declination to make the payments, then why wasn't that issue resolved at the arbitration?

MR. NICKOLA: Let me just recite a -- I don't want to bore you. But the suit -- the claim was --

THE COURT: Uninsured motorists and the No Fault benefits.

MR. NICKOLA: Pardon me?

THE COURT: Uninsured motorist benefits and No Fault benefits.

MR. NICKOLA: Underinsured.

THE COURT: Underinsured. Okay. Yeah.

MR. NICKOLA: The claim was made and there was a tortfeasor that was involved. Finally, the tortfeasor offered the policy limits. We couldn't resolve that until we got permission of the insurance company.

They then finally granted permission to do so. At that particular point, it was resolved with

their permission, written permission, which you have in the motion.

Then at that point, they still said, hey, we're not -- we're done with you. This is the underinsured motorist company, we're done with you.

We said, no, you're not done with us. So, we got into that issue. So, they would not participate in trying to resolve the matter, although we did filed the claim and the claim was pending with them. Not again just against the tortfeasor. So, they were in it from the word go.

Then because they wouldn't participate, we filed a direct lawsuit against our own carrier. The defendant in this case is the carrier for the Nickola's.

In response to that -- here's where the sanctions are requested to come in. In response to that, they filed an answer saying we don't have to arbitrate this case. And they falsely submitted a defense saying that it requires everybody to agree to an arbitration.

Sometime before then, I asked for a certified copy of the policy. It was given to me. I'm saying to the adjuster -- and this is in the motion -- look, I don't know what you're talking

about, because I don't see any language like that in the policy. Then at that point, he just wasn't responding whatsoever.

So, we filed the lawsuit. They filed a false defense saying they had no obligation to do anything from our standpoint. They didn't agree.

THE COURT: Who's they? MIC? Is that who you're referring to?

MR. NICKOLA: Yes. And the adjuster.

So, the case -- now, again, we're in Circuit Court with this case we're in right now before you. That case is then pending. It was pending for over a year and a half. We got some interrogatories and requests for admissions submitted to MIC.

THE COURT: Well, wait a minute. I show that it was filed on April 8, 2005. It was ordered into arbitration on March 6, 2006.

MR. NICKOLA: 2000 what?

THE COURT: 2006.

MR. NICKOLA: Okay.

THE COURT: Less than a year.

MR. NICKOLA: So, again, it was pending a year to a year and a half, and there's discovery --

THE COURT: It's less than a year.

MR. NICKOLA: Well --

THE COURT: April to March is 11 months.

MR. NICKOLA: Okay. It's pending 11 months.

But all during that time, discovery is going on. They demanded a jury trial. We were ready to go on that basis.

During the course of my discovery, I've got requests to admit to them. Finally, they said, oh, my goodness. I have a motion for summary disposition before this Court. Together with my request for admissions that there's no language in any policy that gives them the right not to arbitrate. They say, oh, my goodness, here we go. Now, we made a mistake. What we did was cite the uninsured section of the policy, rather than the applicable underinsured section of the policy.

Then on that basis, before we had the hearing on my motion for directed verdict, that's when we came to an agreement that the tort claim that was pending for the amounts of $80,000 a piece that would be submitted to binding statutory arbitration. And then it was. In lieu of --

THE COURT: Why did it take six years?

MR. NICKOLA: Well, we filed our demand for arbitration. When they finally came to the understanding that they would arbitrate, we named our

arbitrator timely. They named their arbitrator. Then Mr. Hanflik and Mr. Brickley -- or Mr. Hanflik and Mr. --

THE COURT: I mean, this file, I think, was closed by us in March of 2006.

MR. NICKOLA: It wasn't closed, Your Honor. The order of the Court was that the Court would retain jurisdiction to enter the appropriate awards.

THE COURT: I understand. But it wasn't an open case on our docket list at least.

MR. NICKOLA: It was not an open case on the docket. It would have gone properly -- I'm not sure the procedure. It would have gone to a special arbitration docket.

So, at that point, Mr. Hanflik and Mr. Steel, George Steel, were not able to agree to an arbitrator. We asked them to do so. They couldn't. Then I had some discussions with Mr. Brickley and we still couldn't come up with an approach.

So, the question is I can't force the arbitrators to name an arbitrator. Just like the Court would take a matter under advisement, I can't call you and say hurry up and make a decision, Judge, any more than I can ask the arbitrators.

Then subsequently what happened, Thelma

Nickola was diagnosed with a serious disease which ultimately claimed her life. And, on that basis, there had to be some probate matters there.

George Nickola, again, without ever seeing a dime of this underinsured coverage, then he fell and hit his head and he sustained serious brain damage. It almost killed him. It did not. He finally survived that. Then he fell again and the second fall ultimately claimed his life.

So, during that period of time, we're entitled to statutory interest or prejudgment interest from the time we made the claim pursuant to the Unfair Trade Practices Act until the case was resolved or until the arbitrators rendered a decision.

Now, in this particular case, specifically, the arbitrators did not enter an award for any interest other than through the date of the arbitration award.

So, on that basis, we're entitled to prejudgment interest from the day --

THE COURT: Wait a minute. They entered interest from when to when?

MR. NICKOLA: From the date the -- they entered a judgment and the arbitration award which only went through the date of the award. Nothing

else.

THE COURT: That's 2012 or 2013, one or the other.

MR. NICKOLA: Hang on just a second, Your Honor.

THE COURT: Mr. Rockwell was appointed as --

MR. NICKOLA: Hang on just one moment. I'll get --

THE COURT: -- of August of 2012.

MR. NICKOLA: Hang on, Your Honor. Let me just take a quick look.

Here's the award. That is the award for their physical damages only. They specifically say that the award is inclusive of interest (inaudible) as an element of damage from the date of the injury to the date of the suit - *the date of the injury to the date of the suit.* Not the date of the award. Not inclusive of interest, fees or costs that otherwise might be allowable by the Court.

THE COURT: So, now, I have to have a trial to determine what those are?

MR. NICKOLA: No. No. You don't have to --

THE COURT: Why?

MR. NICKOLA: Because it's 12 percent. The statute is quite clear on that basis. It's 12

percent.

Now, you do have to --

THE COURT: If I'm reading the response correctly, it's not quite as clear as you believe it to be.

MR. NICKOLA: I'm sorry, Judge?

THE COURT: I mean, if it's so clear, why are we here?

MR. NICKOLA: I don't know. I don't know.

THE COURT: I mean, he doesn't agree with you.

MR. NICKOLA: Well, he's wrong. He's clearly wrong.

The law is clear. Judge, this issue came up and there was some confusion back in 2006, 2005 and 2006. The Court of Appeals convened a special panel of the Court of Appeals. They addressed the issue in terms of when this is triggered, this 12 percent is triggered. When you make your claim, if you are a first party claimant, if you are directly entitled to the benefits --

THE COURT: Is there an issue of bad faith or good faith in this claim --

MR. NICKOLA: No.

THE COURT: -- in making the interest

determination?

MR. NICKOLA: No.

THE COURT: Is it an issue of good faith or bad faith?

MR. PHILLIPS: No. It's not an issue of good -- well, there's an issue of good faith or bad faith in terms of the UTPA penalty provision. Yes.

THE COURT: Okay.

MR. NICKOLA: Say again?

THE COURT: Are you seeking that?

MR. NICKOLA: Say again?

THE COURT: Are you seeking the UTPA benefits?

MR. NICKOLA: Yes. Yes.

THE COURT: How do I determine good faith or bad faith without having a hearing?

MR. NICKOLA: It's not bad faith. That's not the issue.

The issue that you determine is from the day we made the claim and 60 days thereafter. We are the direct benefits. We make the claim against our own company under that statute. That company has 60 days to pay. Irrespective of whether or not there's a dispute in terms of the amount, they have the obligation to pay. That's clear by the cases.

If they don't pay within that 60 days, then they have 60 days to say this is the proofs that we need to make a satisfactory proof of claim. They never did that. They never submitted anything.

So, when you read the statute, it is clear they've got three things to do. They get the claim. Once they've got the claim, they've got 60 days to either pay it or they've got to say this, in writing, is what we determine you need to do to make a satisfactory proof of loss. Now, if you don't, even if the amount is reasonably disputed, they are not excused from paying the 12 percent.

The second sentence of that Act says if you are a tort claimant. In other words, I'm suing you, Judge, for a tort and I am a tort claimant against whatever your insurance company is and I'm a third party claimant -- not a first party, a third party claimant. Then on that basis, if the amount is reasonably in dispute, on the second sentence of that law, then they may be excused from the 12 percent interest. It does not excuse them from statutory inference. But they are excused from the 12 percent.

That's basically what the entire panel of the Michigan Court of Appeals made up of a cross-section of political -- not political -- different

philosophies, let me say, of the judges, they say we read the statute exactly as it's written. And I think I'm turning into a firm believer of that philosophy. Because that's exactly what the statute says. If you are a first party claimant, there is no excuse. You eighter -- you get the claim, then you either have to pay it within 60 days or say this is the -- in writing, this is what constitutes a satisfactory proof of loss. They never did that in this case.

So then, the case is pending. It goes to arbitration. Specifically reserved from the arbitrator's award is the interest on this case.

The only thing that remains here is the arbitrators are charged to make a determination of the date from the injury until the date suit is filed. The rest of it has to be determined by you.

Now, you say, do I have to have a hearing? Not on that issue. He has not filed any kind of proper response, other than to say, well, it's a third party claim. It's not a third party claim. It's a first party claim.

The only thing you need to do is have a hearing, if there's no way to get it resolved ahead of time, in terms of the amount of sanctions to be imposed on them for their false defense that they

filed in this lawsuit at the beginning that resulted in the delay of 11 months.

Now, Judge --

THE COURT: The arbitration award, they make the award inclusive of interest as an element of damage from the date of injury to the date of suit. Do you agree?

MR. NICKOLA: That's correct. So, from the date of the suit until now, we're entitled to interest.

THE COURT: Was this issue discussed at the arbitration?

MR. NICKOLA: Yes, it was discussed. That's why specifically the arbitrator pulled it out. Judge, if you go to arbitration and the parties all agree all issues are going to be submitted to arbitration --

THE COURT: Which I assume they would.

MR. NICKOLA: No. No. Specifically, this was not submitted to arbitration.

THE COURT: By what order?

MR. NICKOLA: There was no order. It was by agreement. It was by agreement.

THE COURT: Did I agree to that when I sent it to arbitration?

MR. NICKOLA: Pardon me?

THE COURT: Did I agree to that when I signed the order for arbitration?

MR. NICKOLA: No. You just submitted it to arbitration. The arbitrators did not consider interest beyond the date of this lawsuit being filed. That was reserved.

What you did do was reserve in your order --

THE COURT: I may have. But, if I did, I was misinformed because I wouldn't have if I was informed. When I send it to arbitration, as far as I'm concerned, that's it. But I understand. I read the opinion or the order.

MR. NICKOLA: It was not agreed to by us that it would be submitted to arbitration. The arbitrators clearly did not consider that.

THE COURT: All right.

MR. NICKOLA: All they did was award interest from the day of the tort until the date suit was filed.

So, the only thing you have to do -- the calculations, we have the calculations and I submitted them with the brief. If you go to the statutory interest, 1613, I believe it is, then they are entitled to a credit of what they would pay under 1613 against the 12 percent.

But the bottom line is the plaintiffs would require 12 percent, the total amount. So, where it comes from, either one of those two calculations, are fine.

I did do the calculations and sent those to him, I think, Thursday or Friday. They're not part of the record. But I just did the calculations so that he could see him.

So, the only thing you do here in terms of a hearing beyond this point is to have a hearing on terms of the amount of the attorney fees. My fees for defending against a frivolous defense, and it was a frivolous defense from the word go -- you've got an adjuster, I think, out in California who's trying to make a determination of this and he's not knowledgeable, let's call it. Let me say it that way.

So, when suit is filed, they file a defense that is totally unfounded. There is no basis for that defense.

So then, we go through that process and the tort claim of a lawsuit. That's when they say finally, hey, we screwed up. They don't say that in those words. But they do acknowledge that there was no basis for them to file their defense.

So, what we have --

THE COURT: Let me hear from the other side. It's 10:30 and I've got people waiting on the 10:30 call.

MR. PHILLIPS: Good morning, Your Honor. Mark Phillips appearing on behalf of defendant MIC.

Your Honor, I think there's a lot of moving parts. I'd kind of like to delineate a couple issues.

Starting with the request for the attorney fees. This goes back -- attorney fees is a sanction. This goes back to the filing of the lawsuit. I would put to the Court that a defense was filed, an answer to the complaint to was filed and there may have been some confusion at the time regarding whether or not the underinsured language versus uninsured language was controlling. But at the end of the day, both parties agreed, okay, arbitration is appropriate and it went into arbitration.

The Court has broad discretion in assessing attorney fees as a sanction. I think this is a case, as I highlighted in my brief, that does not warrant the imposition of attorney fees for that discrete period of time back in 2005/2006.

In terms of the UTPA, penal interest provision, which I gather is the main meet of this motion as I read the motion and read the brief, I

don't believe it is applicable, Your Honor, to this instant case and by the specific language of the statute itself.

If this was a PIP case, if this was a first party case, where a first party case, a name insured, was seeking benefits and they were not entirely paid, potentially the UTPA would be applicable and that 12 percent would be applicable. But we already have that in the No Fault Act. That is the panel interest penalty provision under an automobile insurance policy is specifically provided for in the No Fault Act.

The UTPA 500.2006(6) states specifically if there's any specific inconsistency between this section, the UTPA, and sections 3101-3177, going on, the provisions of this sections do not apply. In other words, the UTPA is saying if there's conflict between the UTPA and the No Fault Act, UTPA does not apply.

THE COURT: What benefits under the No Fault Act were being sought in this case?

MR. PHILLIPS: No. No. No. The benefits -- contractual benefits were being sought in this case. Underinsured motorist benefits, tort benefits. Not No Fault first party benefits. Third party tort benefits were being sought in this case.

THE COURT: Okay. So, the No Fault -- why would the No Fault Act apply?

MR. PHILLIPS: Well, with the No Fault Act, you still have to meet the threshold. You still have to establish a threshold injury in order to be eligible for coverage. That's key here.

In the statute, if the plaintiff -- this is, I'm sorry, 500.2604(4). If the claimant is a third party tort claimant, then the benefits shall bear interest from the date 60 days after satisfactory proofs are received by the insured at the rate of 12 percent per annum -- this is the important part -- if the liability of the insurer for the claim is not reasonably in dispute. Liability for the insurer.

This is a tort claim where the threshold has to be established. If we adopt plaintiffs' counsel, as soon as a claim is made, there's no notion that we have to -- the threshold injury does not have to be established in underinsured and uninsured motorist cases. That can't be the case. It absolutely cannot be the case.

The case law is clear that the threshold injury has to be established before coverage can even be trigger. There is where this is reasonably in dispute.

This is a case involving -- two plaintiffs were involved in a motor vehicle accident and they settled with the tortfeasor and an assessment could be made that that was sufficient compensation for those injuries. This is a case where you have two individuals who had pre-existing conditions --

THE COURT: By virtue of the settlement with the tortfearsor, there's an acknowledgment at least on some party for that litigation that they met the threshold.

MR. PHILLIPS: Even if that's the case though, then the reasonable in dispute is, well, you've been compensated for those injuries. Your injuries don't rise beyond $20,000, in this case.

That, of course, can be contested and prodded and established. I mean, the notion that in underinsured or uninsured motorists cases, the plaintiff just has to say pay me my money is not the case because of the fact that it is in fact a third party case. Although, they may be named insureds, it's a third party case and this is reasonably in dispute.

The language of the statute itself establishes that. I've gone through -- I went through and --

THE COURT: They've met the threshold.

MR. PHILLIPS: They met the threshold after we found out from the arbitration panel. It would be the same thing if we tried this case.

The only way we know if a threshold has been met, for the most part under *McCormick,* is if a jury tells us. A jury, like the arbitration panel, could decide, you know what, the threshold hasn't been met, or it could also decide that you've been compensated for those injuries. Maybe you've met the threshold and the amount you've already received is full compensation for those injuries. Certainly, that's reasonably in dispute.

I've gone through, Judge, and I've pulled all the cases and I've attached that as a part of my response. There's no case out there that interprets the UTPA as applying to underinsured motorist's contracts or the notion -- or for claims seeking personal injury benefits.

These cases that discuss UTPA, *Griswold* being one, all involve CGL policies, life policies, life insurance policies, commercial policies. Nothing involving the No Fault Act or policies arising under the No Fault Act. I think that's important because I don't think *Griswold* just says, okay, if you're the

named insured, that you're automatically entitled to payment of these benefits. I mean, we make this distinction in the law and the No Fault arena too, first party versus third party claims. And why is that? Because a third party claim is for tort injuries.

That's the case here. They are seeking tort damages for personal injuries. The application of the No Fault Act has to be applied. So, on that basis, I absolutely do not concur or believe that the UTPA provision is applicable here.

Now, as for the seeking of prejudgment interest. Judge, I've got to be honest with you. You asked a very important question of what took so long? I don't have the answer to that. I don't understand what took so long to arbitrate this case.

It seems to me -- I heard an earlier case talking about plaintiffs, I guess, sleeping on their rights. It seems to me that this case is one that could have been resolved and should have been resolved through the arbitration process years ago, *years ago*.

To award prejudgment interest from the date of the filing of the complaint up until the date of the award or beyond simply allows the plaintiff to just sit back and not do anything and all the time the

interest clock is ticking.

Mr. Nickola said that the two arbitrators that were appointed couldn't agree on a third and there was nothing that they could do. Well, of course, there was, and he did it in August of 2012. He filed a motion with this Court saying, Judge, appoint the third party neutral. He should have done that years ago.

This inability of Mr. Hanflik and Mr. Steel to appoint the third party neutral, by my review of the records, was known in 2006. There was no decision made. So, at any point thereafter, he could have come in and said, okay, Judge, we need you to appoint a neutral, let's get this arbitration going. That simply wasn't done. This was allowed to just drag out, drag out and drag out.

I would say if there's any award of interest to be permitted, it certainly is not under the UTPA. I would ask this Court to consider a discrete period of time consistent with the facts under the prejudgment statute. I would also urge this Court not to impose sanctions by way of attorney fees.

I should add ultimately what I'm asking the Court to do is affirm the arbitration award as is. And I brought with me today the arbitration checks for

tendering.

Thank you, Your Honor.

THE COURT: Thank you.

MR. NICKOLA: Judge, just clearly in response to what he has said, he is totally wrong. The statute is absolutely clear, 500.2006. All of the cases that he has cited after 2007 reaffirm the position of the special claims panel of the Court of Appeals. It's 12 percent.

The statute and the argument I am hearing here is that this is a third party claim. It is not a third party claim. He just can't make it a third party claim by saying so.

The fact that the plaintiffs were directly insured, that goes to the issue of the language in 2006(3). Once they've got the claim, certain things have to happen. The first thing that happens, the insurer -- this is (3) -- shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of the claim unless the claim is settled within 30 days. It was not. The clear language of the statute.

We then go to (4), and that's what the panel of the Court of Appeals specifically directed themselves to. If the benefits are not paid on a

timely basis, the benefits shall bear simple interest from the date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12 percent per annum.

It goes on then. If the claimant is the insured, or an individual, or an entity directly entitled to benefits under the insured's contract of the insurance -- that is what the Nickola's were clearly -- it goes on to say in the second sentence that --

THE COURT: Just so I'm clear, what benefits were they entitled to get under this policy from the get go?

MR. NICKOLA: What benefits were they entitled to get under the policy from what?

THE COURT: From the get go, from the very beginning? When they got notice of the claim, what were they to have been --

MR. NICKOLA: They were entitled to the underinsured motorist insurance coverage.

THE COURT: When was the determination made that it was underinsured?

MR. NICKOLA: I'm sorry, Judge?

THE COURT: When did the underinsured clause come into effect?

MR. NICKOLA: On the date they were injured. The date of the accident.

THE COURT: Was there insurance with the other party?

MR. NICKOLA: Yes, $20,000 coverage.

THE COURT: Okay. So, they knew immediately on the day of the accident that there was more than $20,000 in damages?

MR. NICKOLA: Absolutely.

THE COURT: How did they know that?

MR. NICKOLA: Well, they knew it from the date that I filed the claim. Let's go there. They knew it from the date that I filed the claim, which was shortly after that. I've got the date in my brief.

THE COURT: How would they know that? How would they know the value of the claim immediately upon your filing the complaint or the notice?

MR. NICKOLA: If they didn't know it, the second sentence of that statute is now what comes into play. If they say now -- hang on a minute -- if the claimant is a third party tort claimant, then the benefits shall bear interest 60 days or pay the interest if the liability of the insured for the claim is not reasonably in dispute.

Now, to answer your question specifically. In that 60 day period, if they say the amount of the Nickola's claim is reasonably in dispute, the statute is clear. They have to give written notice and say the amount of the claim is reasonably in dispute, if you're the third party claimant. They don't have that same right if it's a direct claim, and this was a direct claim. This was the direct claim.

THE COURT: Okay. I'm done.

MR. NICKOLA: Now --

THE COURT: Okay. I'm done. I've heard enough. Thank you.

(At 10:41 AM, proceedings concluded)

Tape No. 12/09/13 10:41 AM

STATE OF MICHIGAN)
COUNTY OF GENESEE)

I, Jan Fagerman, do hereby certify that this transcript, consisting of 29 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on Monday, December 9, 2013, before the Honorable Richard B. Yuille, Circuit Judge.

October 10, 2014 *Jan Fagerman*

JAN FAGERMAN CER 7125
Circuit Courthouse
900 S. Saginaw Street
Flint, Michigan 48502
(810) 424-4454

Appendix 24

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

Joseph G. Nickola, Personal Representative of the Estate of George Nickola, deceased, et al,

Plaintiffs,

Case No. 05-81192-NI

vs

Judge Richard B. Yuille

MIC General Insurance Corporation,

Defendant.

ORDER DENYING MOTION TO ASSESS COSTS, SANCTIONS, ET AL PURSUANT TO MCL 500.2006

At a session of said Court held in Flint, Michigan, June 19, 2014.

PRESENT: Honorable Richard B. Yuille, Circuit Judge.

Pending before this Court is plaintiffs' claims for prejudgment penalty interest authorized by Michigan's Uniform Trade Practices Act (UTPA), MCL 500.2001, et seq. The particular claims at issue are plaintiffs' efforts to recover underinsured motorist benefits awarded through arbitration pursuant to their no fault insurance policy.

The Court has reviewed the briefs of the parties and heard the arguments of counsel.

The Court finds that the analysis provided by defendant to be correct. If there is any inconsistency between the Michigan No Fault Act and the UTPA, the provisions of the UTPA do not apply. MCL 600.2006 (6).

The Court further finds that the underinsured motorist claims were reasonably in dispute. Further, the Court is of the opinion that if there was an

issue regarding the wrongful withholding of underinsured motorist benefits, that issue should have been heard by the arbitrator.

Plaintiffs' motion is **DENIED**.

The arbitration awards are affirmed.

Richard B. Yuille, Circuit Judge
June 19, 2014

Appendix 25

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH G. NICKOLA, Personal Representative for the Estate of GEORGE and THELMA NICKOLA,

Plaintiff-Appellant,

v

MIC GENERAL INSURANCE COMPANY, d/b/a GMAC INSURANCE,

Defendant-Appellee.

FOR PUBLICATION
September 24, 2015
9:00 a.m.

No. 322565
Genesee Circuit Court
LC No. 05-081192-NI

Before: GADOLA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

In this action against defendant, MIC General Insurance Company, d/b/a GMAC Insurance, concerning underinsured motorist benefits, plaintiff, Joseph G. Nickola, as personal representative of the estate of George and Thelma Nickola,[1] appeals the June 19, 2014 order denying plaintiff's request for attorney fees and interest.[2] We affirm in part and remand for further proceedings.

[1] George and Thelma were originally listed as plaintiffs in this action. However, during the pendency of this case, they passed away, requiring the appointment of plaintiff, their son, as personal representative. For ease of reference, we will refer to George and Thelma by name, and will use the term "plaintiff" to refer to Joseph G. Nickola, the personal representative.

[2] Although plaintiff's claim of appeal asserts that this appeal of the June 19, 2014 order is an appeal as of right, we do not agree. The order did not dispose of all the claims of the parties, see MCR 7.202(6) (describing final orders); notably, as discussed in more detail below, the order did not resolve plaintiff's request for entry of a judgment on the arbitration award. Moreover, because there is no judgment, the order appealed does not qualify as a postjudgment order awarding or denying attorney fees and costs under MCR 7.202(6)(a)(iv). However, in the interest of judicial economy, we exercise our discretion and treat the claim of appeal as an application for leave to appeal and grant the application. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case involves a protracted procedural history. The matter arose out of a motor vehicle accident that occurred on April 13, 2004. George and Thelma, who were insured by defendant, were injured[3] when an automobile driven by Roy Smith, who was insured by Progressive Insurance Company, struck their automobile. The maximum available coverage on Smith's auto policy with Progressive was $20,000 per individual involved in an accident. George and Thelma, with defendant's consent, settled the tort claim, with Progressive paying its client's policy limits on or about November 21, 2004. Thereafter, they turned to defendant, their no-fault insurer, and sought underinsured motorist (UIM) benefits. Defendant's policy with George and Thelma provided UIM coverage in the amount of $100,000 per person and $300,000 per accident; George and Thelma each sought $80,000, which represented the $100,000 policy limit minus the $20,000 already received from Progressive.

Defendant denied the claim for UIM coverage in February 2005, alleging that George and Thelma could not establish a threshold injury for noneconomic tort recovery under MCL 500.3135. In response to this denial, George and Thelma sent defendant a written demand for arbitration of their UIM claim, consistent with their auto policy. The UIM coverage provision in their policy with defendant provided that in the event the insurer and the insureds were unable to agree as to either: (1) whether an insured was legally entitled to UIM damages; or (2) the amount of UIM damages:

> *Either party may make a written demand for arbitration*. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. [Emphasis added.]

Despite the fact that the policy stated that *either* party could demand arbitration, defendant responded to the request for arbitration on March 1, 2005, by denying the demand, stating that it never agreed to arbitrate and that *both* parties had to agree to arbitration under the policy before a UIM claim could proceed to arbitration. The reasons for defendant's denial in the face of the policy's arbitration clause are not entirely clear from the record.

Defendant's denial of the request for arbitration prompted George and Thelma to file a complaint for declaratory relief on April 8, 2005, in which they asked the trial court to compel arbitration. In answering the complaint, defendant "neither admit[ted] nor denie[d] the allegations" raised in the complaint concerning whether one party to its insurance contract with George and Thelma could unilaterally compel arbitration, but admitted that it had denied George and Thelma's written demand for arbitration. However, in a September 20, 2005 response to a request for admissions, defendant admitted that the arbitration language in the policy stated that

[3] As noted, George and Thelma died during the pendency of the instant litigation. According to the record, neither death was caused by injuries suffered in the motor vehicle accident that sparked this litigation.

either party could unilaterally demand arbitration. And in November 2005, defendant stated that it had "no objection to the matter being submitted to arbitration . . . ."

Because of defendant's initial denial that arbitration was proper, George and Thelma moved the trial court for sanctions against defendant. They claimed that any assertion by defendant that arbitration was not required under the policy was a "frivolous defense." Following a hearing on February 14, 2006, the trial court entered an order submitting the matter to arbitration, but reserved ruling on George and Thelma's request for sanctions in relation to the few-month delay prompted by defendant's initial opposition to arbitration. Before it would rule on the matter, the court expressly ordered that George and Thelma "shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees." At the motion hearing, George and Thelma's counsel promised to provide the trial court with this information. The trial court's written order, dated March 6, 2006, retained jurisdiction to "enforce compliance and/or make any other determination, orders and/or judgments necessary to fully adjudicate the rights of the parties herein."

The parties named their respective arbitrators soon after the trial court's written order, but disagreement over the appointment of a third arbitrator brought the proceedings to a grinding halt. The chosen arbitrators could not agree to the appointment of a third arbitrator. Neither party took action on the matter for over six years, until August 13, 2012, when plaintiff moved the trial court to appoint a third arbitrator.[4] It is unclear from the record what caused this lengthy delay. During this six-year delay, George and Thelma died, leading to the appointment of plaintiff as personal representative of their respective estates.

The parties finally proceeded to arbitration in October 2013, and the arbitration panel awarded $80,000 to plaintiff for George's injuries and $33,000 for Thelma's injuries. The awards were to be "inclusive of interest, if any, as an element of damages from the date of injury to the date of suit, but not inclusive of other interest, fees, or costs that may otherwise be allowable by the Court."

On November 25, 2013, plaintiff moved the trial court for: (1) attorney fees and sanctions because of defendant's frivolous defense to arbitration; (2) penalty interest under MCL 500.2006, the Michigan Uniform Trade Practices Act (UTPA) for defendant's failure to promptly pay UIM benefits; and (3) to enter judgment against defendant on the arbitration award. The trial court denied the motion in all respects, but stated that it "affirmed" the arbitration award. With regard to penalty interest, the court found that the UTPA should not apply to a claim for UIM benefits. Further, even if the UTPA did apply, MCL 500.2006(4)'s "reasonably in dispute" language insulated defendant from having to pay penalty interest. Finally, the trial court ruled that the issue of penalty interest should have been heard before the arbitration panel.

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[4] On appeal, defendant attempts to pin the entirety of the delay on plaintiff. However, the arbitration agreement contained in the policy provides that in the event the arbitrators selected by the parties were unable to agree on a third arbitrator within 30 days, "*either may request* that selection be made by a judge of a court having jurisdiction." (Emphasis added).

II. SANCTIONS UNDER MCR 2.114

Plaintiff argues that the trial court should have granted sanctions against defendant under MCR 2.114 for initially asserting in its filings with the court that arbitration could not be demanded unilaterally under the insurance policy. The trial court's 2006 order reserved a ruling on attorney fees but required George and Thelma to produce evidence of their attorney fees incurred during the delay caused by defendant's initial refusal to arbitrate. Specifically, the order stated that "Plaintiff shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees." Plaintiff never complied with that order. Indeed, even when plaintiff made a renewed request for sanctions in 2014, he never complied with the trial court's 2006 order to provide proof of his attorney fees incurred during the relevant time period. Plaintiff's failure to comply with that order, despite having years to do so, is tantamount to waiver of this issue.[5] "The usual manner of waiving a right is by acts which indicate an intention to relinquish it, *or by so neglecting and failing to act* as to induce a belief that it was the intention and purpose to waive." *The Cadle Co v Kentwood*, 285 Mich App 240, 254-255; 776 NW2d 240 (2009) (citation and quotation marks omitted; emphasis added). Where plaintiff repeatedly failed to comply with the trial court's order to provide documentation of his attorney fees for the pertinent time period, it is difficult to fault the trial court for failing to award those fees as a sanction under MCR 2.114. Indeed, plaintiff had over eight years to supply the requested fees, but never did so. See *Reed Estate v Reed*, 293 Mich App 168, 177-178; 810 NW2d 284 (2011) (waiver may be shown by a course of conduct, including neglecting and failing to act in such a manner as to induce the belief that the party failing or neglecting to act has the intent to waive). Plaintiff's failure to act and neglect of the trial court's mandate is tantamount to waiver. See *The Cadle Co*, 285 Mich App at 254-255.

Plaintiff argues that it was "impossible" for him to determine the amount of attorney fees to which he was allegedly entitled without waiting for arbitration to conclude. This ignores that the trial court, at the February 14, 2006 motion hearing, asked for the fees to which plaintiff believed he was entitled at that time. Plaintiff's counsel expressly promised to provide that figure. Plaintiff was to submit costs and fees incurred *during the time* between when defendant answered the complaint and admitted the mistake. There was never an invitation by the trial court to include in the amount of fees requested those fees incurred even after the matter went to arbitration. Any attempt by plaintiff to obtain additional fees ignored the court's order. Moreover, the argument ignores the fact that, even when arbitration was over, plaintiff still failed to provide the trial court with his requested fees.

We also note that plaintiff seeks attorney fees for defendant's conduct that occurred *before* George and Thelma filed their complaint in 2005. That is, plaintiff appears to seek sanctions under MCR 2.114 for defendant's conduct in initially denying the UIM claim. Any argument by plaintiff in this regard is without merit. MCR 2.114(A), applies to "all pleadings, motions, affidavits, and other papers provided for by" the Court Rules. Defendant's initial

[5] On appeal plaintiff makes no effort to comply with the 2006 order and has yet to produce evidence of his claimed attorney fees.

decision to deny arbitration was not a pleading, motion, affidavit, or other paper filed under the Court Rules. Rather, it was simply a response to plaintiff's request for arbitration. Nothing about that response brings it within the ambit of materials that could subject defendant to sanctions under MCR 2.114.

III. PENALTY INTEREST UNDER THE UTPA

Plaintiff argues that the trial court erred by concluding that defendant was not required to pay penalty interest under the UTPA for its failure to timely pay UIM benefits. This Court reviews de novo the trial court's ruling on a motion for penalty interest pursuant to MCL 500.2006(4). *Angott v Chubb Group Ins*, 270 Mich App 465, 474-475; 717 NW2d 341 (2006). Resolution of this issue also requires examination and interpretation of MCL 500.2006(4), which is an issue of law this Court reviews de novo. *Id.* at 475.

UIM benefits are not statutorily mandated; they are an agreement for benefits voluntarily entered into between an insured and an insurer. *Dawson v Farm Bureau Mut Ins Co*, 293 Mich App 563, 568; 810 NW2d 106 (2011). The UTPA provides a mechanism to help insureds obtain payment for these and other types of benefits in a timely manner. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 554; 741 NW2d 549 (2007). "MCL 500.2006 provides for imposition of penalty interest for the late payment of a claim[.]" *Id.* The statute provides, in pertinent part:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> * * *
>
> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. [MCL 500.2006(1), (4).]

MCL 500.2006(4), the penalty-interest provision, draws a distinction between a claimant who is the insured or who is an individual directly entitled to benefits under an insurance contract (a first-party insured), and a claimant who is a third-party tort claimant. The first

sentence of § 2006(4) simply states that a first-party insured is entitled to penalty interest if benefits are not paid within 60 days after the insurer obtains satisfactory proof of loss. *Griswold*, 276 Mich App at 565-566. As explained by this Court in *Griswold*, "if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute." *Id.* at 566 (citation and quotation marks omitted). By comparison, the second sentence of § 2006(4), which applies to third-party tort claimants, imposes penalty interest on the insurer *only* if the claim "is not reasonably in dispute." *Id.* at 565-566. Central to plaintiff's argument on appeal is the notion that the "not reasonably in dispute" language of § 2006(4) does not apply to claims by a first-party insured. Defendant, meanwhile, likens plaintiff to a third-party tort claimant in this claim for UIM benefits, meaning that the "not reasonably in dispute" language of MCL 500.2006(4) applies.

A brief examination of the facts at issue in *Griswold* is illustrative in resolving this issue. In deciding *Griswold*, this Court convened a special panel to resolve a conflict over the application of MCL 500.2006(4) and the types of claims to which "reasonably in dispute" applied. The case involved a consolidation of three cases. See *Griswold*, 276 Mich App at 559-560. Two cases involved insureds who sought benefits from their respective insurers for water damage. *Id.* at 559-560. In the third case, the insured's building was destroyed by a fire, and the insured sought benefits from its insurer for the damage caused by the fire. *Id.* at 560. In other words, each of the three consolidated cases involved insureds seeking benefits from their own insurers for losses that were directly covered under the respective policies.

Plaintiff contends that he, as the personal representative for George and Thelma, is seeking payment of benefits that were owed directly to insureds under an insurance policy. As noted, UIM benefits arise solely from the policy. See *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 194; 747 NW2d 811 (2008) (explaining that "[w]hen an insured is injured by a tortfeasor motorist whose own policy is insufficient to cover all of the insured's damages, *the insured can seek coverage from his or her UIM policy* for damages that exceed the tortfeasor's policy limits.") (emphasis added). At first glance, plaintiff's argument—that he is entitled to penalty interest because he sought benefits that were owed directly to an insured by an insurer and that the "reasonably in dispute" language of § 2006(4) does not apply—has some appeal in light of *Griswold*.

However, the instant case is not as simple as *Griswold*. As noted, *Griswold* involved a consolidation of cases in which each of the insurers was directly liable to their first-party insureds for covered losses. Here, while plaintiff is seeking UIM benefits that are provided in the policy, he is doing more than merely making a simple, first-party claim as was involved in *Griswold*. In order for plaintiff to succeed on his UIM claim, he has to essentially allege a third-party tort claim against his own insurer—or, in this case, against the insurer of George and Thelma, of whom plaintiff is the personal representative. Defendant, the insurer, stands in the shoes of the alleged tortfeasor and plaintiff seeks benefits from defendant that arose from the alleged tortfeasor's liability. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 464-466; 430 NW2d 636 (1988) (explaining UIM coverage). See also *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005) (explaining that "[u]ninsured motorist insurance" which is substantially similar to UIM insurance, "permits an injured motorist to obtain coverage from his or her own

insurance company to the extent that a third-party claim would be permitted against the [ ] at-fault driver."). This third-party tort claim is different in nature from a typical claim for first-party benefits, as it will "often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life." *Adam v Bell*, __ Mich App __; __ NW2d __ (Docket No. 319778, issued August 11, 2015) (citation and quotation omitted), slip op at 4. In addition, such a third-party tort claim is designed to compensate a claimant "for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses" that are generally associated with a first-party claim. *Id.* (citation and quotation omitted). In other words, plaintiff's UIM claim is tied to a third-party tort claim for damages that, in many respects, is "fundamentally different" than a typical first-party claim. See *id.* (citation and quotation omitted).

In *Auto-Owners Ins Co v Ferwerda Enterprises, Inc (On Remand)*, 287 Mich App 248; 797 NW2d 168 (2010), judgment vacated in part on other grounds 488 Mich 917 (2010),[6] this Court recognized that not all claims for penalty interest under MCL 500.2006(4) fit neatly into the *Griswold* analysis. In that case, the insurer sought a declaratory judgment stating that it had no duty to defend and indemnify its insureds in a third-party tort action based on an exclusion in the insurance policy. *Id.* at 252. The insureds filed a counterclaim, alleging breach of contract, estoppel, and waiver, and they requested penalty interest under MCL 500.2006(4). *Id.* The trial court found that there was coverage for the underlying third-party tort claim and awarded penalty interest under MCL 500.2006(4). *Id.* at 253-254. On appeal, the insureds defended the trial court's award of penalty interest on the ground that the insurer breached its contract by failing to pay benefits under the insurance policy. *Id.* at 258. The insureds argued that pursuant to *Griswold*, the issue of penalty interest turned only on the failure to pay benefits, and not whether those benefits were reasonably in dispute. *Id.* at 259. This Court disagreed with the insureds' argument that the case involved a simple breach of the insurance policy. Rather, in that case, "the breach of contract claim [was] specifically tied to the underlying third-party tort claim." *Id.* at 259. This scenario, reasoned the Court, was "a wholly different situation than that found" in *Griswold* and other cases that awarded penalty interest for the failure of an insurer to pay first-party claims. *Id.* at 259-260. As such, this Court held that the "reasonably in dispute" language found in the second section of MCL 500.2006(4) applied and precluded an award of penalty interest because the benefits in that case were reasonably in dispute. *Id.* at 260.

Applying *Ferwerda* in the case at bar, the trial court did not err in employing the "reasonably in dispute" language found in the second sentence of MCL 500.2006(4) and denying

[6] In *Ferwerda*, 287 Mich App 248, this Court decided two issues: (1) whether an award of attorney fees was appropriate; and (2) whether the imposition of penalty interest was warranted. Our Supreme Court denied leave to appeal with regard to the penalty interest issue, but remanded with regard to the attorney fee issue. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, __ Mich __; 784 NW2d 44 (2010). Subsequently, the Court vacated this Court's ruling as to attorney fees. *Auto-Owners Ins Co v Ferwerda Enterprises, Inc*, 488 Mich 917; 789 NW2d 491 (2010). Thus, this Court's holding as to penalty interest remains good law.

penalty interest to plaintiff. This case does not involve a claim where the insured simply sought the payment of benefits due directly under an insurance policy. As in *Ferwerda*, 287 Mich App at 259, the situation in this case "is a wholly different situation than that found" in cases such as *Griswold*. Rather, the claim for benefits under UIM coverage was "specifically tied to the underlying third-party tort claim." See *id.* Indeed, in the UIM context, defendant was standing in the shoes of the alleged tortfeasor. The fact that the claim for UIM benefits was specifically tied to the underlying third-party tort claim warrants applicability of the "reasonably in dispute" language found in the second sentence of MCL 500.2006(4). See *id.* The trial court did not err in applying this standard to plaintiff's claim for penalty interest.

Moreover, contrary to plaintiff's alternative contention on appeal, the claim in this case was reasonably in dispute. Even assuming plaintiff could establish a threshold injury, plaintiff's UIM claim needed to show that the injuries suffered by George and Thelma exceeded the amount of the settlement with Smith.[7] See *McDonald*, 480 Mich at 194 (explaining UIM coverage). Given George and Thelma's respective ages, preexisting conditions, and the nature of the injuries alleged in this case, the amount of damages, if any, that they were entitled to beyond that received from Smith was a matter of reasonable dispute.[8] Thus, the trial court did not err by denying penalty interest under MCL 500.2006(4).

IV. PREJUDGMENT INTEREST

Lastly, plaintiff seeks prejudgment interest under MCL 600.6013 from the date of the filing of the complaint until payment of the arbitration award. "MCL 600.6013 [ ] entitles a prevailing party in a civil action to prejudgment interest from the date the complaint was filed to the entry of judgment." *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 624; 550 NW2d 580 (1996). "The purpose of this statute is to compensate the prevailing party for loss of use of the funds awarded as a money judgment and to offset the costs of litigation." *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002). Plaintiff seeks interest under MCL 600.6013(8), which provides:

> Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state

[7] The policy's UIM coverage provision states that "We [the insurer] will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."

[8] This is not to say that UIM benefits will in all cases be subject to reasonable dispute. For instance, in a scenario where an accident renders an otherwise healthy insured a quadriplegic and the tortfeasor's insurance policy provided only $20,000 in recovery, there could likely be no dispute that the insured was entitled to UIM coverage.

> treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. In an action for medical malpractice, interest under this subsection on costs or attorney fees awarded under a statute or court rule is not calculated for any period before the entry of the judgment. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Plaintiff is seeking prejudgment interest from the date of its complaint in April 2005 until the date of payment. Plaintiff never raised the issue of prejudgment interest before the trial court. In addition, it does not appear from the record that the arbitration award was ever reduced to a judgment, or that the arbitration award has been paid. Under the Michigan Arbitration Act,[9] circuit courts have jurisdiction to enforce and render judgment on an arbitration award. MCL 600.5025. Here, despite the fact that plaintiff's motion expressly sought entry of a judgment on the arbitration award, the trial court did not honor that request. Instead, the court simply "affirmed" the arbitration award, and to that extent, the trial court erred. Because it does not appear that the arbitration award was ever reduced to a judgment, and this case has not otherwise been dismissed, plaintiff remains entitled to obtain a judgment on the award. And, when seeking that judgment, because the issue of prejudgment interest was never decided, plaintiff can raise the issue of prejudgment interest at that time. As such, we decline to address the prejudgment interest issue, without prejudice to plaintiff raising it when he moves for entry of a judgment enforcing the arbitration award. Indeed, at this point, neither the arbitration panel[10] nor the trial

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[9] Effective July 1, 2013, the Legislature repealed the Michigan Arbitration Act and replaced it with the Uniform Arbitration Act, MCL 691.1681 *et seq.* See *Fette v Peters Constr Co*, __ Mich App __; __ NW2d __ (Docket No. 320803, issued May 21, 2015), slip op at 4. The Uniform Arbitration Act "does not affect an action or proceeding commenced or right accrued before this act takes effect." MCL 691.1713. See also *Fette*, __ Mich App at __, slip op at 4. Because George and Thelma filed a complaint for arbitration in 2005, the Uniform Arbitration Act does not apply, and the Michigan Arbitration Act governs. See *id.*

[10] In this regard, we note that ordinarily, preaward, prejudgment interest would be deemed to have been submitted to the arbitration panel. See *Holloway Const Co v Oakland Co Bd of Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996) ("The decision whether to award preaward, prejudgment interest as an element of damages is reserved as a matter of the arbitrator's discretion."). In this case, there was nothing in the arbitration agreement reserving the issue of preaward, prejudgment interest. However, the arbitration award expressly stated that the arbitration panel awarded interest as an element of damages from the time of the injury to the time the complaint was filed, but it was not deciding matters pertaining to "other interest." Prejudgment interest after the filing of the complaint fits into the broad category of "other interest." Thus, the arbitration panel expressly declined to address the prejudgment interest plaintiff is now seeking. The record contains no indication as to why the arbitration panel did not consider any "other interest," nor is there any indication that the parties objected to the arbitration panel's decision in this regard.

court has decided the issue of plaintiff's entitlement to statutory prejudgment interest under MCL 600.6013.

Lastly, on the issue of prejudgment interest, we note that defendant contends that plaintiff should not be entitled to any prejudgment interest because of his—and George and Thelma's—delays in this case. "[A] court may disallow prejudgment interest for periods of delay where the delay was not the fault of, or caused by, the debtor." *Eley v Turner*, 193 Mich App 244, 247; 483 NW2d 421 (1992). Here, however, it is not apparent that the entirety of the delays in this case can be assigned to plaintiff. With regard to the six-year delay caused by disagreement over the third arbitrator, defendant is incorrect in stating that the arbitration agreement required the insured, and only the insured, to petition the circuit court to select a third arbitrator in the event of disagreement. Rather, the agreement as contained in the policy states "*either* may request that selection" of a third mediator "be made by a judge of a court having jurisdiction." (Emphasis added). If plaintiff raises the issue of prejudgment interest at the time he seeks a judgment on the arbitration award, the delays in this case can be a consideration for the trial court, but should not at the outset deny plaintiff any claim to prejudgment interest under MCL 600.6013.

Affirmed in part and remanded to the trial court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Kathleen Jansen
/s/ Jane M. Beckering

Appendix 26

STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA ADAM,

Plaintiff-Appellant,

v

SUSAN LETRICE BELL and MINERVA DANIELLE BELL,

Defendants,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
August 11, 2015
9:00 a.m.

No. 319778
Oakland Circuit Court
LC No. 2013-131683-NI

Before: HOEKSTRA, P.J., and MARKEY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendant State Farm Mutual Automobile Insurance Company (State Farm) on the ground that plaintiff's claims were barred by res judicata. We reverse and remand for further proceedings.

This Court reviews de novo a decision to grant a motion for summary disposition. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 271; 792 NW2d 798 (2010). The question presented in this appeal, whether the doctrine of res judicata bars a claim, is a question of law we review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

On July 3, 2011, plaintiff was injured when she was struck by a vehicle driven by Susan Bell and owned by Minerva Bell. In March 2012, plaintiff filed a lawsuit against State Farm for personal injury protection (PIP) benefits under the no-fault act. See MCL 500.3105 (insurer liability), and MCL 500.3107 (allowable expenses). That claim was settled on October 15, 2012,

with plaintiff signing a release of all claims for no-fault benefits "up to the date of [the] release . . . ." A stipulated order of dismissal with prejudice as to plaintiff's claims "for benefits up to 10-15-12 only" was entered on November 5, 2012.

On January 16, 2013, plaintiff filed a third-party complaint alleging negligence against Susan Bell, a claim of owner liability against Minerva Bell, and a claim of breach of contract against State Farm with respect to uninsured motorist (UM) benefits. State Farm filed a motion for summary disposition on April 5, 2013, asserting plaintiff's UM claim was barred by the doctrine of res judicata. The trial court heard the parties' arguments on this motion on July 24, 2013. The trial court ruled that plaintiff's UM "claim clearly could have been filed in the prior matter and was not, therefore, the claim is barred by res judicata." The court's order granting State Farm summary disposition was entered on August 22, 2013. Subsequently, on December 13, 2013, the trial entered a default judgment in plaintiff's favor against the Bell defendants in the amount of $250,000. This last order was a final order closing the case and permitting plaintiff to appeal by right the order granting State Farm summary disposition.

In Michigan, the doctrine of res judicata is applied broadly to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). The doctrine is "employed to prevent multiple suits litigating the same cause of action." *Id*. Specifically, the doctrine of res judicata is a judicially created remedy that serves to relieve parties of the cost and aggravation of multiple lawsuits, conserve judicial resources, and to encourage reliance on adjudication by avoiding inconsistent decisions. *Pierson Sand & Gravel*, *Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Importantly, res judicata is intended to "promote fairness, not lighten the loads of the state court by precluding suits whenever possible." Moreover, res judicata will not be applied when to do so would subvert the intent of the Legislature. *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 630; 808 NW2d 471 (2010).

The doctrine of res judicata bars a subsequent action where "(1) the prior action was decided on the merits, (2) the prior action involved the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair*, 470 Mich at 121. In addition, the prior action must also have resulted in a final decision. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

There is no dispute here that the prior action for PIP benefits involved the same parties and was decided on the merits. The action was dismissed with prejudice pursuant to a stipulated order. See *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997) (holding a voluntary dismissal with prejudice acts as an adjudication on the merits for purposes of res judicata). The only dispute remaining in this case is whether the two actions arose from the same transaction such that plaintiff in the exercise of reasonable diligence could have but did not raise this UM claim during the prior action; therefore, the claim should be res judicata. *Adair*, 470 Mich at 121.

Michigan's broad interpretation of the third element of the res judicata doctrine has been referred to as a "same transactional test," as distinguished from a "same evidence test." *Adair*, 470 Mich at 123-125. Under the same evidence test, the issue is whether the same evidence is

required to prove the claimed theory of relief. *Id*. Under the same transaction test, the facts must be viewed pragmatically, regardless of the number of variant legal theories that might support claims for relief. *Id*. The fact that differing claims may require different evidence might be relevant to deciding if the claims arise from the "same transaction," but it is not dispositive. *Id*. at 124-125. Rather, quoting 46 Am Jur 2d, Judgments 533, p 801, and adding emphasis, our Supreme Court has stated, "[w]hether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time*, *space*, *origin or motivation*, [and] whether they form a convenient trial unit . . . ." *Adair*, 470 Mich at 125. Using this pragmatic approach, we conclude that although plaintiff's PIP claim and plaintiff's tort/UM contract claim both arise from the same automobile accident, the claims also have significant differences in the motivation and in the timing of asserting the claims, and they often do not form a convenient trial unit. Further, applying res judicata to the facts of this case would not promote fairness and would be inconsistent with the Legislature's intent expressed through the no-fault act. The no-fault act provides for the swift payment of no-fault PIP benefits. On the other hand, it severely restricts the right to bring third-party tort claims that would form the basis for a UM contract claim.

In reaching this conclusion we find instructive and persuasive *Miles v State Farm Mut Auto Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2014 (Docket No. 311699), which addressed the exact question presented in this case.[1] The facts of *Miles* are not identical but are very close to those in the present case. Miles was injured when struck by a motor vehicle in July 2008; he sued State Farm for PIP benefits under his mother's insurance policy as a resident relative. That suit was settled in April 2010 and dismissed in July 2010. Miles filed a new complaint in June 2010 for additional PIP benefits and also asserted that State Farm wrongfully refused to pay him uninsured motorist benefits. The trial court granted State Farm's motion for partial summary disposition, ruling that the UM claim could have been brought with the first PIP claim and was therefore barred by res judicata. We quote at length the majority opinion in *Miles*, which reversed the trial court, and we adopt its reasoning as our own:

> It is plain that both Miles' claim for PIP benefits and his claim for uninsured motorist benefits arise from the same accident and involve the same injuries and insurance policy. For that reason, there is a substantial overlap between the facts involved with both claims. But that being said, there are also significant differences between the two types of claims.
>
> A person injured in an accident arising from the ownership, operation, or maintenance of a motor vehicle as a motor vehicle is immediately entitled to PIP benefits without the need to prove fault. See MCL 500.3105(2); MCL 500.3107. The PIP benefits are designed to ensure that the injured person receives timely payment of benefits so that he or she may be properly cared for during recovery.

[1] "Although unpublished opinions of this Court are not binding precedent, MCR 7.215(C)(1); . . . they may, however, be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citation omitted).

Shavers v Attorney General, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Moreover, the injured person has a limited period within which to sue an insurer for wrongfully refusing to pay PIP benefits. See MCL 500.3145(1). Because an injured person is immediately entitled to PIP benefits without regard to fault, requires those benefits for his or her immediate needs, and may lose the benefits if he or she does not timely sue to recover when those benefits are wrongfully withheld, the injured person has a strong incentive to bring PIP claims immediately after an insurer denies the injured person's claim for PIP benefits.

In contrast to a claim for PIP benefits, in order to establish his or her right to uninsured motorist benefits, an injured person must—as provided in the insurance agreement—be able to prove fault: he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 465-466; 430 NW2d 636 (1988). Significantly, this means that the injured person must plead and be able to prove that he or she suffered a threshold injury. *Id*. at 466, citing MCL 500.3135(1). Except in accidents involving death or permanent serious disfigurement, an injured person will therefore be required to show that his or her injuries impaired an important body function that affects the injured person's general ability to lead his or her normal life in order to meet the threshold. MCL 500.3135(1) and (5). This in turn will often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life. See *McCormick v Carrier*, 487 Mich 180, 200-209; 795 NW2d 517 (2010). Thus, while an injured person will likely have all the facts necessary to make a meaningful decision to pursue a PIP claim within a relatively short time after an accident, the same cannot be said for the injured person's ability to pursue a claim for uninsured motorist benefits. Finally, an injured person's claim for uninsured motorist benefits involves compensation for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses related to the injured person's care and recovery. See *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 408-410; 808 NW2d 240 (2010) (discussing the nature of the economic and noneconomic damages that are awarded in negligence actions). Consequently, a claim for PIP benefits differs fundamentally from a claim for uninsured motorist benefits both in the nature of the proofs and the motivation for the claim.

The record shows that within a short time of [the] accident State Farm took the position that Miles' medical ailments were not causally related to the accident at issue and denied his request for PIP benefits on that basis. Because Miles could assert a PIP claim without the need to prove fault and without having to establish the full extent of his injuries, he could assert his PIP claim within a short time of State Farm's decision to deny his claims. Indeed, because he required those benefits for his care and recovery, he had a powerful motivation to bring the claims as soon as practical. Further, in order to establish those claims,

> he only had to present evidence that his claims arose from the accident and met the other criteria provided under MCL 500.3107.
>
> Miles, however, could not establish his claim for uninsured motorist benefits without being able to prove that [the driver of the vehicle that struck him] would be liable in tort for his injuries and that he met the serious impairment threshold. Because his claim for uninsured motorist benefits required evidence to establish the nature and extent of his injuries and proof that the injury affected his ability to lead his normal life and the original dispute involved only whether Miles' injuries were causally related to the accident at issue, we conclude that it was not practical for Miles to bring his claim for uninsured motorist benefits in his original suit.
>
> Because Miles' claim for uninsured motorist benefits was not one that could have been litigated during the time of his original lawsuit, his failure to bring his claim for uninsured motorist benefits did not implicate the doctrine of res judicata. *Adair*, 470 Mich at 125. [*Miles*, unpub op at 4-5.]

This conclusion is also supported by the fact that PIP claims have a base one-year limitations period unless the insurer receives written notice of injury within that time or the insurer has previously made a payment of PIP benefits for the injury, MCL 500.3145(1). Even then, the one-year-back rule limits recovery to allowable expenses incurred within the year preceding the filing of an action for benefits. *Id*.; *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 208; 815 NW2d 412 (2012); *Linden v Citizens Ins Co*, 308 Mich App 89, 95; 862 NW2d 438 (2014). This Court has opined that a contractual one-year limitation period for a UM claim was unreasonable because the insured (1) may not have a sufficient information about his own physical condition to warrant filing a claim within that timeframe, (2) may not know the insurance status of the at-fault driver, and, thus, "(3) the action may be barred before the loss can be ascertained." *Rory v Continental Ins Co*, 262 Mich App 679, 686; 687 NW2d 304 (2004), rev'd 473 Mich 457 (2005). Although *Rory* was reversed by our Supreme Court, the Office of Financial and Insurance Services (OFIS), found its reasoning "compelling," OFIS, Order No. 05-060-M (December 16, 2005), p 3.[2] Based on this reasoning, the statutory limits on claiming noneconomic damages under MCL 500.3135, and the Secretary of State's inability to confirm whether a person was insured on the day of an accident, the OFIS ruled under the authority of MCL 500.2236(5) that a limitation on UM claims of fewer than three years is unreasonable. *Id*., p 4; see also *Ulrich v Farm Bureau Ins*, 288 Mich App 310, 312, 317-319; 792 NW2d 408 (2010). Under the reasoning of *Rory*, 262 Mich App 679, and OFIS, Order No. 05-060-M, we must conclude that a UM claim may not yet be ripe for litigation until after a PIP claim must be filed. Consequently, applying res judicata to essentially require mandatory joinder of a mere potential UM claim with a PIP claim would be inconsistent with the very divergent statutory

[2] See <http://www.michigan.gov/documents/Prohibition_Order_121605_145496_7.pdf> (accessed August 3, 2015).

treatment of these two very different types of no-fault claims. See e.g., *Bennett*, 289 Mich App at 630.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Pat M. Donofrio

Appendix 27

STATE OF MICHIGAN

COURT OF APPEALS

JUANITA RIVERA and JESUS M. RIVERA,

Plaintiffs-Appellants,

v

ESURANCE INSURANCE CO, INC.,

Defendant-Appellee.

UNPUBLISHED
July 24, 2007

No. 274973
Oakland Circuit Court
LC No. 2005-071390-CK

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendant's motion for summary disposition. We affirm.

I. FACTS

Plaintiff[1] was injured in an automobile accident in December 2003. Defendant insured plaintiff, but the other driver, Lakeisha Carter, was uninsured. Plaintiff filed suit against Carter, which resulted in entry of a default judgment. Plaintiff then filed the instant action against defendant, alleging breach of contract for defendant's failure to pay noneconomic (pain and suffering) and economic (excess wage loss) damages under its policy.

Defendant moved for summary disposition, asserting that it was entitled to a judgment as a matter of law because plaintiff had not met the statutory threshold—she had not suffered a serious impairment of body function. Plaintiff filed a cross-motion for summary disposition, arguing that she was entitled to judgment as a matter of law because defendant was bound by the default judgment entered in the third-party case, wherein another judge of the court had concluded that plaintiff had suffered a serious impairment of body function. The trial court granted defendant's motion, concluding that plaintiff's injuries have not affected her general ability to lead her normal life.

[1] All references to "plaintiff" in the singular are to Juanita Rivera because Jesus Rivera's claim is derivative.

Defendant then moved for entry of an order of dismissal. But plaintiff objected, asserting that the trial court's decision regarding whether plaintiff suffered a serious impairment of body function did not dispose of the case because plaintiff was still entitled to excess wage loss benefits for the reduction in work hours she suffered as a result of her injuries. Plaintiff also moved for reconsideration of the trial court's grant of summary disposition on the issue of serious impairment of body function. The trial court heard oral arguments and concluded that defendant was entitled to summary disposition as to both of plaintiff's claims. As to plaintiff's excess wage loss claim, the trial court reasoned that while plaintiff had shown that her work hours had been reduced since the accident, she failed to show that the reduction was based on her injuries and not other causes, such as a downturn in the auto industry. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*.

III. ANALYSIS

A. Serious Impairment of Body Function

Plaintiff first argues that the trial court erred in concluding that she has not suffered a serious impairment of body function. Specifically, plaintiff contends that her injuries have affected her general ability to lead her normal life. We disagree.

Under the no-fault act, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

The issue whether a plaintiff has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). Otherwise, the determination whether the plaintiff suffered a serious impairment of body function is a question of fact for the jury. See *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004).

In determining whether a plaintiff has suffered a serious impairment of body function, the trial court must consider the following: (1) whether an important body function of plaintiff has been impaired; (2) whether the impairment is objectively manifested; and (3) whether the

impairment affects the plaintiff's general ability to lead his or her normal life. *Id*. at 132-133. A plaintiff does not satisfy the first prong of the serious impairment test if an unimportant body function is impaired or if an important body function has been injured but not impaired. *Id*. at 132. Further, "[f]or an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting with express approval SJI2d 36.11. Here, the trial court concluded that plaintiff's injury was an objectively manifested impairment of any important body function, and defendant has not challenged that decision in a cross-appeal. Therefore, the only element at issue here is whether plaintiff's injuries have affected her general ability to lead her normal life.

Under *Kreiner*, to determine whether a person is generally able to lead his or her normal life, this Court must consider whether the objectively manifested impairment has affected the overall course of the plaintiff's life. *Kreiner*, *supra* at 130-131. It must examine how, to what extent, and for how long the plaintiff's life has been affected by the impairment, looking at plaintiff's life both pre- and post-accident. *Id*. at 131. In addition, it may consider such factors as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id*. at 133-134. However, self-imposed restrictions do not establish that an injury has affected a person's ability to lead his or her normal life. *Id.* at 133 n 17. Further, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137.

We conclude that the trial court did not err in granting defendant's motion for summary disposition because plaintiff has failed to meet the threshold of serious impairment of body function – she has failed to show that her general ability to lead her normal life has been affected by the injuries she sustained in the auto accident.

Plaintiff suffered injuries to her back and neck in the auto accident. While her doctor has imposed ongoing work restrictions[2] and she testified that it takes her longer to do her job, plaintiff has continued to work since the accident in excess of 40 hours per week. Additionally, while plaintiff testified that she is now unable to participate in many activities post-accident because of her injuries, such as bike riding, working out, gardening, and household chores, she has not been restricted from any of these activities by her doctor. Instead, these restrictions are

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[2] Plaintiff's doctor opined as follows regarding plaintiff's limitations:

> Physical labor work, lifting and carrying involved. Bending and stooping involved. Standing long hours. Was standing long hours, 1 hour and 45 minutes stretch; patient can't do it. For the rest of her life, she is limited from it. The patient may do minimal physical work, sedentary or desk job, with great flexibility in freedom, change in position and posture and freedom to change the height of the workstation also, should have greater freedom of flexibility and working hours. She may not work 40 hours every week consistently.

self-imposed, and self-imposed restrictions, based on real or perceived pain, are insufficient to establish an impairment. *Kreiner*, *supra* at 133 n 17. Therefore, even when viewing this evidence in the light most favorable to plaintiff, we conclude that there is no genuine issue of material fact as to whether plaintiff's injuries have affected her general ability to lead her normal life.

After *Kreiner*, it is not enough for plaintiff to show that her injuries had some effect on her life. Rather, she must show that her injuries affected the overall course of her life. *Kreiner*, *supra* at 130-131. "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id*. at 137. Here, because the evidence presented by plaintiff does not show that the overall course of her life has been affected by her injuries, she has failed to meet the threshold of a serious impairment of body function.

Plaintiff further argues that the trial court erred in concluding that she did not suffer a serious impairment of body function because, under the doctrine of res judicata, defendant was bound by the default judgment entered against the uninsured driver in the third-party case, which stated that plaintiff did suffer a serious impairment of body function. Again, we disagree.

The doctrine of res judicata bars a second, subsequent action "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Mgt*, 463 Mich 569, 575; 621 NW2d 222 (2001). In this case, the prior action was decided on the merits, *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006) (finding that a default judgment is a final decision on the merits), and the issue of serious impairment of body function was resolved in the first case in plaintiff's favor. However, both actions do not involve the same parties or their privies. Defendant was not a party to the third-party case. Therefore, for the doctrine of res judicata to apply, defendant must be in privity with Carter, the uninsured motorist. Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant in the first action. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to and agent, a master to a servant, or an indemnitor to an indemnitee. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 15; 672 NW2d 351 (2003). That is not the case here. Defendant and the third-party tortfeasor's rights and interests are not the same; therefore, they are not in privity for purpose of the doctrine of res judicata.

B. Excess Wage Loss

We also reject plaintiff's argument that the trial court erred in granting summary disposition as to her excess wage loss claim.

Under MCL 500.3135(3)(c), damages are recoverable for "work loss . . . as defined in sections 3107[3] and 3110[4] in excess of the "daily, monthly, and 3-year limitations contained in those sections." Further, an injured party may recover excess wage loss damages under MCL 500.3135(3)(c) even where the plaintiff has not met the threshold requirement necessary to

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[3] MCL 500.3107 provides, in part, as follows:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.
>
> (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

[4] MCL 500.3110(4) states, "Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred."

sustain an action for noneconomic damages under MCL 500.3135(1). *Ouelette v Kenealy*, 424 Mich 83, 86; 378 NW2d 470 (1985). However, a plaintiff may only recover for the "'loss of income from work [he] would have performed' if he had not been injured[,]" not loss of earning capacity *Id*. at 87 (citation omitted). Moreover, a plaintiff must show that he suffered wage loss as a result of the auto accident. See *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 644; 513 NW2d 799 (1994).

In this case, the trial court heard oral arguments regarding plaintiff's excess wage loss claim[5] and concluded that defendant was entitled to summary disposition because plaintiff failed to show anything more than mere speculation that her reduction in work hours was caused by her injuries. We agree.

While plaintiff's employment records reflect that she has indeed worked fewer hours since the accident in December 2003, there was evidence that plaintiff's work hours fluctuated from year to year before the accident, and plaintiff has continued to work an average that is in excess of 40 hours per week since the accident. From our review of the record in this case, it would appear likely that the reduction in plaintiff's work hours resulted from a lack of overtime. Therefore, plaintiff failed to show that her excess wage loss was a result of the injuries she sustained in the auto accident.

Affirmed.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette

[5] The issue was raised at the hearing on the parties' motions for entry of an order.

Appendix 28

STATE OF MICHIGAN

COURT OF APPEALS

ANNE SCHENCK,

Plaintiff-Appellant,

v

ALIA ASMAR and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 1, 2014

No. 315053
Macomb Circuit Court
LC No. 11-002380-NI

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this action for payment of underinsured motorist coverage, plaintiff appeals as of right the trial court's judgment, following the jury trial, in her favor in the amount of $10,000. We affirm.

Plaintiff had a $100,000 underinsured motorist policy with defendant State Farm. Plaintiff was injured when her vehicle was struck by a vehicle driven by defendant Alia Asmar while traveling at a high rate of speed on I-696. Plaintiff suffered a fracture of her back. Before the accident, plaintiff was described as energetic, lively, and an avid soccer player. She also worked for Google in Ann Arbor. After the accident, plaintiff was described as sad and depressed, unable to walk, and unable to work. Plaintiff collected wage loss benefits from State Farm under the no-fault policy in the amount of $86,446.95. Plaintiff also collected $71,150.79 in disability benefits through Prudential. However, in contrast to plaintiff's claims that she was unable to drive to and sit at work because of pain, there was evidence that plaintiff travelled extensively, including trips to Europe and Alaska, and her physical injury was resolved within six months of the accident. Consequently, the defense questioned whether plaintiff claimed an extensive disability because the payment of benefits exceeded her income.

Asmar admitted responsibility for the accident, but she was only insured up to $25,000 for noneconomic damages, which the no-fault insurer paid, and Asmar was dismissed from the case. Through plaintiff's underinsured motorist policy, State Farm agreed to pay noneconomic damages up to $100,000 that Asmar would have been responsible for. Therefore, at trial, the issues involved whether plaintiff suffered a threshold injury pursuant to MCL 500.3135(1) to collect on the underinsured motorist policy, or more specifically, a serious impairment of body function.

Before trial, plaintiff moved the trial court to hold that evidence of the payments of Prudential and State Farm was not admissible before the jury under the collateral source rule. State Farm essentially argued that the evidence was admissible to prove that plaintiff malingered in returning to work. The trial court agreed with State Farm and allowed the evidence, but only to prove that plaintiff malingered in returning to work. After trial, the jury found for the plaintiff in the amount of $10,000.

On appeal, plaintiff argues that the trial court abused its discretion in admitting the aforementioned evidence. We disagree. "We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*. Reversal on the basis of the erroneous admission of evidence is unwarranted unless a substantial right of a party is affected, and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice. *Id*. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "The collateral source rule bars evidence of other insurance coverage when introduced for the purpose of mitigating damages." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990). Evidence regarding collateral sources and their effect on an individual's motivation to return to work is admissible in the trial court's discretion. *Richards v Pierce*, 162 Mich App 308, 318-319; 412 NW2d 725 (1987). The trial court has the discretion to "admit evidence bearing on the question of whether an injured party possessed sufficient incentive to return to work." *Blacha v Gagnon*, 47 Mich App 168, 174-175; 209 NW2d 292 (1973). Consequently, evidence may be admitted that absence from work was not solely attributed to the injuries received, but because plaintiff had accumulated sick leave. *Id*. at 175. Pursuant to *Nasser*, evidence of other insurance coverage is barred by the collateral source rule only where it is being offered to mitigate damages. *Nasser*, 435 Mich at 58. Therefore, if the evidence was admissible for a separate purpose, the trial court properly exercised its discretion in admitting it. *Id*. at 58-59. If the evidence is relevant and offered for a proper purpose, the evidence nonetheless should be excluded if more prejudicial than probative under MRE 403. *Id*. at 59-60.

The present case involves an underinsured motorist claim by plaintiff against State Farm. Such a policy allows an individual to collect from their own insurance carrier in the amount that would be permitted in a suit against the at-fault driver. See *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Under the no-fault act, the at-fault driver is liable for noneconomic loss when "the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue in the present case is whether there was a serious impairment of body function. The no-fault act provides that "a 'serious impairment of body function' is 'an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.'" *McCormick v Carrier*, 487 Mich 180, 194-195; 795 NW2d 517 (2010). "Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *Id*. at 202.

Plaintiff presented evidence that she worked full time at Google and led an athletic, active lifestyle before the accident. However, she testified that her condition following the accident prevented her from working and engaging in her pre-accident activities to establish a

serious impairment of body function. To rebut this evidence, State Farm offered proof that plaintiff was able to return work, evidenced by her multitude of vacations after the accident, including a cruise around Europe and a sailing trip in Alaska. Further, evidence provided by plaintiff's doctor suggested that plaintiff's spine was healed after approximately six months, but she continued to receive disability benefits for 17 months after the accident, when she lost her job at Google, and wage loss benefits from State Farm. In sum, the evidence of the payments provided motive for plaintiff to avoid returning to work — traveling at will while continuing to collect approximately double her salary. *Blacha*, 47 Mich App 175. The evidence was undoubtedly relevant under MRE 401, and admissible under MRE 403. See *Nasser*, 435 Mich 58-60. While there was some danger the jury would assume the money received from State Farm and Prudential was enough to compensate plaintiff for her losses, that outcome was protected against by the trial court's ruling and State Farm's conduct limiting evidence of the payments only to issues regarding serious impairment of body function.

Therefore, because the evidence was admissible to prove whether plaintiff suffered a serious impairment of body function, and not to mitigate damages, the collateral source rule did not apply. *Nasser*, 435 Mich at 58. As such, the trial court properly exercised its discretion in admitting the evidence. *Id.*

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

Appendix 29

STATE OF MICHIGAN

COURT OF APPEALS

JAMES C. DAHLKE and KATHLEEN H. DAHLKE,

Plaintiffs-Appellees,

v

HOME OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 23, 2003

No. 239128
Ingham Circuit Court
LC No. 01-093003-CK

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

In this suit in which plaintiffs, James and Kathleen Dahlke, claimed breach of contract and violations of the Uniform Trade Practices Act (UTPA), and the Michigan Consumer Protection Act (MCPA), defendant, Home Owners, appeals by leave granted the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10). More specifically, Home Owners argues that summary disposition should have been granted for the following reasons: the exclusionary provision in the parties' insurance policy that excludes coverage for losses caused by mold operates to preclude coverage of the Dahlkes' claim; failure to provide adequate proof of loss within the sixty-day time limit provided by the policy operates to preclude coverage of the Dahlkes' claim; the claim was "reasonably in dispute" so as to relieve Home Owners of liability for its refusal to pay the Dahlkes' claim and consequent interest on the claim under the UTPA; and principles of waiver and estoppel were inappropriate to expand coverage in the instant case. Because we agree with Home Owners on the controlling issues, we reverse and remand.

The instant case arises out of Home Owners' denial of coverage to the Dahlkes based on an exclusionary provision in the parties' insurance policy. The facts relevant to the resolution of this appeal are that in January 1999, melting ice and snow on the Dahlkes' roof leaked into their house causing the ceiling to collapse, and causing damage to the walls. Various contractors and adjusters examined the house and determined that in addition to the ceiling and wall damage, the leaking water fostered mold growth which caused the house to be a total loss.[1] Before

[1] There is some indication that the mold damage developed from water leaking into the Dahlkes' house before the water buildup that resulted in the ceiling and wall damage. However, because (continued…)

discovering the extent of the damages to the house caused by mold, Home Owners agreed to pay for repairs, provide temporary housing, and even pay for some remediation of the mold problem by applying a standard milicide. But after further investigation revealed the full extent of the mold damage, Home Owners denied the Dahlkes' claim for mold damages, relying on an exclusionary provision of the parties' insurance policy that provides in pertinent part:

> We do not cover loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss:
>
> (12)(c) Rust, corrosion or electrolysis, mold or mildew, or wet or dry rot.

The denial letter also maintained that the Dahlkes failed to protect the property from further loss.

The Dahlkes filed the instant suit against Home Owners, alleging breach of contract, violation of the UTPA, MCL 500.2006, and violations of the MCPA, MCL 445.903. Home Owners moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issue of material fact existed that losses caused by mold damage were excluded under the terms of the policy regardless of how or when they were caused; that the Dahlkes failed to timely file a proof of loss; that the Dahlkes failed to pursue a declaration of rights or to request statutory appraisal; that the Dahlkes failed to state a claim under the MCPA; and that since the claim was in reasonable dispute, no claim existed under the UTPA.

The trial court denied Home Owners' motion for summary disposition, stating:

> My opinion is that this insurance policy covers losses and damages that flow from those losses. And I believe that, also, in this particular case, the situation is, is that the evidence here at least gives a question as to whether this mold was caused by this water flowing into the house. And that it was – and if it was a consequential event from that it should be covered.
>
> And I also think that it's ridiculous to send out letters wanting to pay for things and then claiming that they are not covered and then claiming you need proof of loss on things that you're already paying for.

This Court granted Home Owners delayed application for leave for appeal.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there

(…continued)

review of the denial of a motion for summary disposition under MCR 2.116(C)(10) requires us to resolve all reasonable inferences in favor of the non-moving party, *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999), we assume that the mold damage at issue resulted from the water leaks that occurred just before the event that caused the Dahlkes to make this claim.

is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 182; 665 NW2d 468 (2003).

On appeal, Home Owners argues that the trial court erred in denying its motion for summary disposition. Specifically, Home Owners claims that the policy language that provides that losses caused "directly or indirectly" by mold, "whether or not any other cause or event contributes concurrently or in any sequence to the loss" excludes coverage for the mold damage to the Dahlkes house. We agree.

Generally, "an insurance policy is a contract that should be read as a whole to determine what the parties intended to agree on." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). "In interpreting insurance policies, we are guided by well-established principles of construction." *Id*. "The policy must be enforced in accordance with its terms; therefore, if the terms of the contract are clear, we cannot read ambiguities into the policy." *Id*. "It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10). *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

With respect to exclusions, it is well settled that "exclusionary clauses in insurance policies are strictly construed in favor of the insured." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). "However, coverage under a policy applies to an insured's particular claims." *Id*. "Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume." *Id*.

In *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58, 59-60; 530 NW2d 120 (1995), this Court examined an insurance policy with an exclusionary clause virtually identical to the exclusionary clause in the instant case, and determined that even where the excluded loss was a direct result of a covered event, the insured could not recover if the policy excluded the loss "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." In that case, heavy rains flooded the plaintiff's car dealership when the local drainage system became partially blocked with a piece of wood. *Id*. The defendant insurance company denied coverage for certain losses, relying on its policy provision that excluded losses caused by flood, surface water, water backing up from a sewer or drain, or certain other events or causes, "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id*. The plaintiff filed suit, and the trial court granted the defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), holding as a matter of law that the plaintiff's losses were caused by surface water and therefore excluded from coverage. *Id*. This Court reasoned:

> It appears to us that plaintiff's losses were the result of an unfortunate sequence or concurrence of direct and indirect causes: heavy rainfall creating surface water that failed to drain away because of debris blocking the drainage system. Plaintiff's claim that the blocked drainage system was "the proximate cause" of its losses misses the point: Whether the blocked drainage system was a direct or indirect cause of plaintiff's water damage, or whether it was *the* principal factor or

> merely a contributing factor, the policy expressly excluded coverage. Accordingly, plaintiff has failed to assert the existence of a genuine issue of material fact, and the trial court did not err in finding that, as a matter of law, plaintiff's losses plainly were excluded from coverage. Summary disposition was proper. [*Sunshine, supra* at 60 (emphasis in original).]

Similarly, in the instant case, the Dahlkes' losses were the result of a winter thaw which led to water damage and mold growth. The parties' insurance policy expressly excluded coverage for loss caused directly or indirectly by mold. Additionally, the policy expressly excluded coverage for such losses "whether or not any other cause or event that contributes concurrently or in any sequence to the loss." Here, loss caused by mold was expressly excluded regardless of the water damage that contributed concurrently or in any sequence to the loss. There was no genuine issue of material fact as to whether the Dahlkes' claimed losses caused by mold were excluded under the terms of the insurance policy, and the trial court erred in denying defendant's motion for summary disposition on this basis.

We decline to adopt the interpretation of the exclusionary provision at issue that is argued by the Dahlkes and amicus curie Michigan Association of Commercial Property Owners. In essence, their argument is that even if damage is of a kind that is named in the exclusion, such as the mold in this case, if the damage results from an otherwise covered event the exclusion does not apply. In our opinion, this interpretation is contrary to the clear and unambiguous terms of the insurance policy which excludes losses caused "directly or indirectly" by any of the named conditions or events, "whether or not any other cause or event contributes concurrently or in any sequence to the loss." The language of the exclusion is typically referred to as "anticoncurrent causation" because it expressly excludes coverage for losses directly or indirectly caused in whole or in part by one of the listed causes of loss. As applied in this case, the "anticoncurrent causation" language of the policy excludes coverage for damage resulting from mold even though the mold itself may have formed as the result of a covered event.

We are not unmindful of the concerns expressed to us regarding the number and breadth of listed causes of loss that are excluded by Home Owners' policy. Our interpretation of the exclusion would result in denial of coverage for damage to covered property that many insureds would ordinarily expect to be covered. For example, section (12)(a) of the policy excludes "wear and tear, marring, scratching or deterioration." Presumably under this section, if the Dahlkes' kitchen cabinets and countertops were scratched or marred by the falling ceiling, they would not be covered. Nevertheless, these concerns do not provide grounds upon which we may rewrite the terms of the policy, and we must apply the unambiguous terms of the policy in this case. *McKusick, supra* at 332; *Henderson, supra* at 353. Further, the Michigan Supreme Court has recently held that an insured's reasonable expectations, "clearly has no application when interpreting an unambiguous contact because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract." *Wilkie v Auto Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003).

The Dahlkes also argue that Home Owners breached an implied covenant of good faith and fair dealing by engaging in dilatory conduct prohibited by the insurance policy. While it is true that there is an "implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured," we are not persuaded by the Dahlkes' argument that Home Owners breached any such duty. *Commercial Union Ins Co v Medical Protective Co,*

426 Mich 109, 116; 393 NW2d 479 (1986). The Dahlkes argue that the insurance policy required Home Owners to pay for covered losses, and that Home Owners' refusal to authorize proper remediation techniques amounted to a failure to perform its obligations under the contract. However, losses caused by mold are specifically excluded from coverage, and Home Owners was under no obligation to pay for corrective measures to remedy losses caused by mold. Moreover, the policy places the onus of protecting the covered property from further damage on the Dahlkes, and an implied covenant does not supersede an express obligation. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994).

Home Owners next argues that the trial court erred in denying its motion for summary disposition and allowing the UTPA claim to proceed. We agree. MCL 500.2006 provides in pertinent part:

> "(1) * * * Failure to pay [insurance] claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> ***
>
> "(4) When benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance."

Therefore, "under the statute, an insurer may refuse to pay a claim and be relieved of paying interest on the claim only when 'the claim is reasonably in dispute.'" *Siller v Employers Ins of Wausau*, 123 Mich App 140, 143-144; 333 NW2d 197 (1983). "Otherwise, an insured is entitled to 12% interest where an insurer does not timely pay the benefits owed to the insured." *Id*. at 144. Here, Home Owners declined to pay the Dahlkes' claimed damages for losses caused by mold based on the policy's exclusionary provision. We believe that the Dahlkes' claim was reasonably in dispute when Home Owners refused to pay for losses caused by mold, based on the clear and unambiguous exclusionary policy provision.

This Court has stated that "the purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims, not to compensate a plaintiff for delay in recovering benefits to which the plaintiff is ultimately determined to be entitled." *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 148; 594 NW2d 74 (1998). We believe that the trial court erred in denying Home Owners' motion for summary disposition as to the UTPA claim, because it is evident that Home Owners disputed its obligation to cover losses caused by mold in good faith, based on the policy's exclusionary provision. Home Owners covered the Dahlkes' claimed losses caused by water damage. Additionally, Home Owners paid for a place for the Dahlkes to live while their house was being repaired. Home Owners clearly fulfilled its obligation under the terms of the policy. Home Owners' obligation to cover losses caused by mold was reasonably in dispute, and the trial court erred in allowing plaintiffs' UTPA claim to proceed.

Finally, Home Owners argues that the trial court erred by employing principles of waiver and estoppel to expand coverage. Apparently relying on Home Owners' payment to the Dahlkes to cover losses arising from the water damage, including its offer to pay for a standard milicide to remedy losses caused by mold, the trial court in effect determined that defendant's actions superseded the exclusionary provision. The trial court stated that "it's ridiculous to send out letters wanting to pay for things and then claiming that they are not covered." However, this Court has held that "the fact that an insurer has paid some benefits to an insured party does not preclude it from later asserting that it owes nothing when the insured party files suit." *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85, 89; 441 NW2d 54 (1989), abrogated on other grounds *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993). Further, Home Owners expressly advised the Dahlkes that the policy may not cover all claimed damages, and expressly relied on the exclusionary provision to deny coverage for losses caused by mold. Additionally, Home Owners' offer to pay for cleaning the mold with a standard milicide was rejected, thereby precluding any claim of detrimental reliance. Consequently, we agree that the trial court erred by employing principles of waiver and estoppel to expand their coverage under the terms of the policy.

In light of our resolution of these issues, we need not address the remaining issues raised on appeal by the parties.[2] More specifically, because summary disposition is appropriate on the basis that the exclusionary clause precludes coverage, it is unnecessary for us to address Home Owners' claim that plaintiffs failed to provide adequate proof of loss within the sixty-day time limit provided by the policy.

In sum, we find that the trial court erred in denying Home Owners' motion for summary disposition. In light of our decision that the exclusionary provision for damages caused by mold precludes coverage for the Dahlkes' claim, that the claim was reasonably in dispute so as to relieve Home Owners of liability under the UTPA, and that principles of waiver and estoppel were inappropriate to expand coverage in the instant case, we believe that Home Owners is entitled to summary disposition in its favor. Accordingly, we remand the case to the trial court for entry of an order granting defendant's motion for summary disposition.

Reversed and remanded with instructions to enter summary disposition in favor of defendant consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

[2] We note that defendant did not raise plaintiffs' MCPA claim as an issue in the statement of questions presented; therefore, defendant failed to properly present this issue for review and we decline to address it. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Appendix 30

Case Search

Case Docket Number Search Results - 322565

Appellate Docket Sheet

COA Case Number: 322565

MSC Case Number: 152535

ESTATE OF GEORGE NICKOLA V MIC GENERAL INSURANCE COMPANY

1	GEORGE NICKOLA ESTATE OF	ZZ		
2	THELMA NICKOLA ESTATE OF	ZZ		
3	NICKOLA JOSEPH G PERSONAL REPRESENTATIVE Oral Argument: Y Timely: Y	PL-AT	RET	(23490) **BENDURE MARK R** 645 GRISWOLD SUITE 4100 DETROIT MI 48226 (313) 961-1525
4	MIC GENERAL INSURANCE COMPANY Oral Argument: Y Timely: Y	DF-AE	RET	(63063) **PHILLIPS MARK E** 1111 WEST LONG LAKE RD SUITE 103 TROY MI 48098 (248) 267-1265
			CO	(66596) **PEPLINSKI NATHAN** 1050 WILSHIRE DR SUITE 320 TROY MI 48084 (248) 649-7800
5	GMAC INSURANCE	DB		

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

07/07/2014 1 Claim of Appeal - Civil
- Proof of Service Date: 07/10/2014
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 23490 - BENDURE MARK R

06/19/2014 2 Order Appealed From
- From: GENESEE CIRCUIT COURT
- Case Number: 05-081192-NI
- Trial Court Judge: 22664 YUILLE RICHARD B
- Nature of Case:
  - Attorney Fees & Costs

07/07/2014 5 Docketing Statement MCR 7.204H
- For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
- Proof of Service Date: 07/07/2014
- Filed By Attorney: 23490 - BENDURE MARK R
- Comments: filed with claim in event 1

07/10/2014 6 Telephone Contact

For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

Attorney: 23490 - BENDURE MARK R

Comments: atty Peseski is correct atty - will file pos

07/10/2014 7 Proof of Service - Generic

Date: 07/10/2014

For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

Attorney: 23490 - BENDURE MARK R

Comments: proof of service of claim on atty Peseski

07/22/2014 8 Appearance - Appellee

Date: 07/22/2014

For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

Attorney: 63063 - PHILLIPS MARK E

07/28/2014 9 Invol Dismissal Warning - No Steno Cert

Attorney: 23490 - BENDURE MARK R

Due Date: 08/18/2014

Comments: No steno cert filed-court reporter(s) and hearing date(s) unknown

08/18/2014 10 Steno Certificate - Tr Request Received

Date: 08/18/2014

Timely: Y

Reporter: 6913 - ROBINSON SHELIE M

Hearings:

02/14/2012

08/13/2012

12/19/2013

08/22/2014 11 Other

Date: 08/08/2014

Reporter: 6913 - ROBINSON SHELIE M

Comments: steno cert for hearing dates in evt 10

10/28/2014 12 Notice of Filing Transcript

Date: 10/20/2014

Timely: Y

Reporter: 6913 - ROBINSON SHELIE M

Hearings:

02/14/2006

08/13/2012

12/09/2013

10/28/2014 13 Transcript Cancelled

Date: 10/20/2014

Reporter: 6913 - ROBINSON SHELIE M

Hearings:

02/14/2012

12/19/2013

Comments: Per online ROA, there was nothing on the record for these hrg dts

10/29/2014 15 Appearance - Appellee

Date: 10/29/2014

For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

Attorney: 25213 - SCHMIDT MICHAEL F

Comments: as co counsel

10/29/2014 16 Appearance - Appellee

Date: 10/29/2014
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Attorney: 66596 - PEPLINSKI NATHAN
Comments: as co counsel- from the same firm as atty Schmidt

10/31/2014 14 Telephone Contact
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Attorney: 25213 - SCHMIDT MICHAEL F
Comments: intends to be co counsel- will not replace atty Phillips in header

12/15/2014 17 Stips: Extend Time - AT Brief
Extend Until: 01/12/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

01/08/2015 18 Motion: Extend Time - Appellant
Proof of Service Date: 01/08/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY
Requested Extension: 02/09/2015
Answer Due: 01/15/2015

01/20/2015 19 Submitted On Administrative Motion Docket
Event: 18 Extend Time - Appellant
District: T

01/22/2015 20 Order: Extend Time - Appellant Brief - Grant
View document in PDF format
Event: 18 Extend Time - Appellant
Panel: MJT
Attorney: 23490 - BENDURE MARK R
Extension Date: 02/09/2015

02/09/2015 21 Brief: Appellant
Proof of Service Date: 02/09/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

02/27/2015 23 Stips: Extend Time - AE Brief
Extend Until: 04/13/2015
Filed By Attorney: 63063 - PHILLIPS MARK E
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
P/S Date: 02/27/2015

04/13/2015 24 Brief: Appellee
Proof of Service Date: 04/13/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 66596 - PEPLINSKI NATHAN
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

04/14/2015 25 Noticed
Record: REQST
Mail Date: 04/15/2015

04/28/2015 26 Motion: Extend Time - Reply Brief

Proof of Service Date: 04/28/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY
Requested Extension: 05/25/2015
Answer Due: 05/05/2015

05/07/2015 27 Record Request
Mail Date: 05/07/2015
Agency: GENESEE CIRCUIT COURT

05/12/2015 28 Submitted On Administrative Motion Docket
Event: 26 Extend Time - Reply Brief
District: T
Item #: 1

05/14/2015 29 Record Filed
Comments: 1 LCF (TRN INC) - GENESEE CIRCUIT

05/19/2015 31 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 26 Extend Time - Reply Brief
Panel: MJT
Attorney: 23490 - BENDURE MARK R
Extension Date: 05/25/2015

05/22/2015 32 Brief: Reply
Proof of Service Date: 05/22/2015
Timely Filed: Y
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

08/28/2015 38 Brief: Supplemental Auth`y
Proof of Service Date: 08/28/2015
Filed By Attorney: 25213 - SCHMIDT MICHAEL F
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

08/31/2015 39 Motion: Strike
Proof of Service Date: 08/31/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY
Immediate Consideration: Y
Answer Due: 09/03/2015
Comments: Motion to Strike Supplemental Authority

08/31/2015 41 Telephone Contact
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Attorney: 23490 - BENDURE MARK R
Comments: Advised motion to strike noticed for after case call date.

09/03/2015 42 Answer - Motion
Proof of Service Date: 09/03/2015
Event No: 39 Strike
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Filed By Attorney: 63063 - PHILLIPS MARK E

09/04/2015 40 Submitted On Motion Docket Affecting Call
Event: 39 Strike

District: T
Item #: 1

09/09/2015 43 Order: Strike - Motion - Deny
View document in PDF format
Event: 39 Strike
Panel: MFG,KJ,JMB
Immediate Consideration Granted
Attorney: 23490 - BENDURE MARK R

09/10/2015 37 Submitted on Case Call
District: D
Item #: 19
Panel: MFG,KJ,JMB

09/24/2015 48 Opinion - Per Curiam - Published
View document in PDF format
Pages: 10
Panel: MFG,KJ,JMB
Result: Affirmed in Part, Remanded
Comments: Remanded to trial court for further proceedings not inconsistent with this opinion

10/29/2015 50 SCt: Application for Leave to SCt
Supreme Court No: 152535
Answer Due: 11/26/2015
Fee: E-Pay
For Party: 3
Attorney: 23490 - BENDURE MARK R

Case Listing Complete